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IN THE

Supreme Court of the United States

October Term, 1979

79-1748

GENERAL COMMITTEE OF ADJUSTMENT, UNITED TRANSPORTATION UNION E., BURLINGTON NORTHERN INC., GREAT NORTHERN SEGMENT,

Petitioner,

vs.

UNITED STATES OF AMERICA and BURLINGTON NORTHERN INC.,

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner General Committee of Adjustment, United Transportation Union E., Burlington Northern Inc., Great Northern Segment prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on March 19, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals, as yet unreported, was issued on March 19, 1980 and appears at Appendix A, *infra,* pages A-1 - A-7.

The earlier opinion of the United States Court of Appeals, reported *sub. nom. General Committee of Adjustment v. Burlington Northern Inc.*, Eighth Circuit, 563 F. 2d 1279 (1977), is reproduced and published as Appendix B, *infra,* pages B-1 - B-16.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The decision in the Court of Appeals for the Eighth Circuit was filed on March 19, 1980. An order for a stay of mandate was filed by that Court on April 15, 1980. This Petition for a Writ of Certiorari was filed within thirty (30) days from the date aforesaid.

QUESTIONS PRESENTED

Petitioner is a labor organization designated as a collective bargaining representative of certain employees of respondent Burlington Northern Inc. Certain members of petitioner are the claimants herein and hold seniority in both the United States and Canada as employees of the respondent railroad. They performed work in Canada and sought an adjustment of claims involved in that work pursuant to a merger protective agreement entered into and enforced by the Interstate Commerce Commission order approving the merger of the Burlington Northern Inc. When petitioner UTU sought to process the claims, the

respondent railroad and the competing labor organization, respondent Brotherhood of Locomotive Engineers, established an arbitration board and determined the claims.

The Court of Appeals has rendered a decision in this matter on important questions regarding the Interstate Commerce Act and the Railway Labor Act; and these issues should be settled by this Court. This Court has never determined any one of these issues; and petitioner submits the following questions as bases for the issuance by this Court of a Writ of Certiorari to the Court of Appeals for the Eighth Circuit:

1. Whether the Interstate Commerce Act applies protection to railroad employees of a United States railroad merging pursuant to the Interstate Commerce Act for work performed by the employees while in Canada.

2. Whether the Interstate Commerce Act and the Railway Labor Act afford remedies in the United States to the petitioner, the designated grievance representative of the claimants, for claims arising out of a merger protective agreement approved by the Interstate Commerce Commission in its order authorizing the merger of the Burlington Northern Inc. when the claims arise under the merger protective agreement from work by the claimants while working in Canada although the claimants hold seniority in both Canada and the United States.

3. Whether the Railway Labor Act empowers the petitioner, the designated grievance representative, to establish a public law board to determine claims made by the petitioner for its union members who are on a seniority roster that includes both United States and Canadian areas and perform work giving rise to the claim while in Canada.

4. Whether the Raiway Labor Act bars these two respondents, a railroad employer and a competing labor organization, from establishing an arbitration panel to determine the merits of claims of these claimants who have designated this petitioner to process those grievances.

5. Whether the Court of Appeals erred in ruling that Canadian Courts had exclusive jurisdiction to vitiate an arbitration decision based upon the Interstate Commerce Act of the United States although it was obvious that the railroad employees involved in the arbitration had never designated anyone to represent them in that arbitration proceeding but had manifestly designated this petitioner as the grievance representative under the Railway Labor Act.

UNITED STATES NOT A PARTY

The Complaint in the United States District Court named the United States of America as a defendant by reason of 28 United States Code 1336 and 2321. The United States filed a motion of dismissal against it as only a statutorily nominal party and that motion was granted. The United States has not been a party since that dismissal.

STATUTORY PROVISIONS INVOLVED

The Interstate Commerce Act, Title 49, Section 1 et seq., provides in part as follows:

> Section 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof,

into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership * * *.

Section 5(2)(f) provides:

As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fail and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 565 of Title 45. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The Railway Labor Act, Title 45, United States Code, Section 151 et seq., provides in Section 2 as follows:

> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.
>
> Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier. * * *
>
> Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the

time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

The Canadian Labour Code provides in part as follows:

101(1) * * * 'parties' means

(a) in relation to the entering into, renewing or revising of a collective agreement and in relation to a dispute, the employer and the bargaining agent that acts on behalf of his employees,

(b) in relation to a different relating to the interpretation, application, administration or alleged violation of a collective agreement, the employer and the bargaining agent, and

(c) in relation to a complaint to the Board under this Party, the complainant and any person or organization against whom or which the complaint is made.

158(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for hearing and determination.

STATEMENT OF FACTS

The petitioner is the General Committee of Adjustment, United Transportation E., Burlington Northern Inc., great Northern Segment. It is the collective bargaining representative, under the Railway Labor Act, for Burlington Northern employees working as firemen, switchmen, brakemen, and conductors.

The respondent rairoad is Burlington Northern Inc., a railway formed from the predecessor Great Northern Railway Company, Northern Pacific Railway Company, Pacific Coast R. R. Co., and the Chicago, Burlington and Quincy Railway Company pursuant to an order of the Interstate Commerce Commission, Finance Docket No. 21478, December 15, 1967, 331 ICC 228.

Respondent Brotherhood of Locomotive Engineers, an intervenor in this matter, is the collective bargaining representative for Burlington Northern employees working in the craft of locomotive engineers.

In the United States District Court, this petitioner, U.T.U., sought an order to enjoin respondents B.N. and B.L.E. from setting up a merger arbitration panel, called a Merger Disputes Board, to determine the merits of certain claims which certain B.N. employees, working as engineers in the craft represented by the B.L.E., submitted to the U.T.U. to process by arbitration. The U.T.U. requested the establishment of a public law board pursuant to the Railway Labor Act, 45 U.S.C. Section 153. The B.N. then submitted the matter to the B.N.-B.L.E. disputes committee established by the Merger Protective Agreement entered into pursuant to the Interstate Commerce Act, Title 45, United States Code, Section 5(2)f.

The United States District Court ruled that the public law board did not have jurisdiction to determine claims when the claimants were working as engineers and their claim representative was the U.T.U. Appendix in 76-1910, page 235, 240.

While the matter was pending before the Court of Appeals, petitioner U.T.U. filed a motion for an expedited hearing and injunction pending completion of appeal. That motion was designed to bar the B.N. and B.L.E. from determining the merits of the claims which were the subject matter of the U.T.U.'s efforts to establish a public law board with the B.N. The Court of Appeals denied that motion.

The Court of Appeals on October 19, 1977, ruled that the petitioner UTU-E does have the right to represent its members who while working as engineers developed claims under the Burlington Northern-Brotherhood of Locomotive Engineer Merger Protective Agreement. *General Committee of Adjustment v. Burlington Northern Inc.*, 8th Cir., 563 F.2d 1279, 1285 (1977). The Court, however, remanded the matter because the B.N. had contended that these particular claims were not subject to a public law board under the Railway Labor Act because that Act does not have extraterritorial application to Canadian citizens employed in Canada. The Court remanded the matter for determination as to whether the work had been performed exclusively in Canada and that if so, "* * *then the trial court must determine whether there was a long standing custom and practice by the U.T.U.-E. and the B.N.I. to submit such disputes to a public law board." The Court further directed the District Court to determine whether a public lawboard could have jurisdiction conferred by custom and practice.

On remand, the District Court referred the matter to the United Staes Magistrate for consideration. The Magistrate prepared a proposed order for the Court; and petitioner U.T.U. filed detailed exceptions and objections to the Magistrate's memorandum. Further hearings were held before the United States District Court, and there was then entered record item 13, docket entry II-21, Findings of Fact, Conclusions of Law and Order for Judgment.

The District Court pointed out that the claimants involved were engineers working in Vancouver, British Columbia, at all times material to their claims. The Court found in Finding of Fact No. 2:

> The claims arose from the imposition of an agreed-to transition factor which in effect reduced the merger protective guarantees under the BN-BLE Merger Protective Agreement, providing for guaranteed compensation as a protective condition of the Burlington Northern merger. Imposition of the transition factor was the result of the reduction of the work week from six to five days as made applicable to them through an amendment to the Canada Labour Code. The claimants have contended that the commensurate reduction of wage guarantees through application of the transition factor was improperly applied to them.

The trial court ruled that there was no long standing custom and practice to submit such disputes to a public law board under the Railway Labor Act and held that the National Railroad adjustment Board would be without jurisdiction to entertain the controversy. Finding of Fact No. 6. The District Court ruled that there is no extra-territorial application of the Railway Labor Act and that therefore that Court had no jurisdiction and that it had

no jurisdiction to void the award of the BN-BLE disputes committee which had been theretofore decided, after the Court had denied the U.T.U.'s motion for injunction pending appeal on the first appeal to this Court.

The BLE-BNI Merger Protective Agreement merger disputes committee in case no. 1-A-E considered the claims of the five engineers who selected this appellant, UTU, not the BLE, to represent them on those claims. The award points out that the employees contended that the Board did not have jurisdiction because the claimants were being represented by the UTU-E . The BNI-BLE merger disputes committee, however, did rule on the merits in interpreting the Merger Protective Agreement, which had been entered into between the parties pursuant to the Interstate Commerce Act and enforced by the Interstate Commerce Commission in its order approving the merger.

The award resulted in a determination that the disputes committee had jurisdiction. The BLE member of the board dissented on the mertis of the award but agreed that the Court had jurisdiction.

The Court of Appeals on March 19, 1980 issued its second opinion in this matter, Appendix A; and it is that decision which we seek to have reviewed by the Supreme Court through a Writ of *Certiorari*. The Court of Appeals repeated its earlier holding on the first opinion that this petitioner's right to submit issues to a public law board does not extend to claims submitted by employees who performed the disputed work exclusively outside the territorial limits of the United States. On the issue left open on the earlier opinion, whether a public law board may have jurisdiction conferred over such claims by custom and practice, it ruled that the claims involved were not inter-

national and that because the issue was unique to Canadian employees working in Canada, the dispute is distinguishable from earlier arbitration awards involving the Burlington Northern. The first opinion, in holding that a public law board does not have jurisdiction over claims submitted by employees performing disputed work exclusively outside the territorial limits of the United States, should be considered by this Court because that does not constitute the law of the case. *Reece v. State of Georgia,* 350 U.S. 85, 87 (1955).

The Court of Appeals ruled further that the precedents between this petitioner and the respondent railroad were distinguishable and therefore did not lend a custom and practice jurisdiction to a public law board.

The Court of Appeals declined to void the arbitration decision of the Merger Disputes Committee established between the respondents, Burlington Northern Inc. and the Brotherhood of Locomotive Engineers, despite the uncontroverted statement that the petitioner United Transportation Union had at all times been the designated grievance representative of the claimants involved herein. The Court of Appeals declined to set aside that decision as an issue for the Canadian courts to determine.

All parties to this litigation have conceded throughout all of the litigation that this petitioner was designated by the claimants involved to handle their grievance, that after the petitioner had requested the establishment of a public law board with the respondent Burlington Northern Inc., the two respondents, Burlington Northern Inc., and Brotherhood of Locomotive Engineers established their own arbitration panel called the Merger Disputes Committeee under the Burlington Northern Inc. - Brother-

hood of Locomotive Engineers Merger Protective Agreement to determine the merits of these claims. That arbitration panel rejected the merits of the claims but held that it had jurisdiction to determine these Canadian claims.

Petitioner United Transportation Union seeks a review of the opinion and decision of the Court of Appeals for the Eighth Circuit to determine primarily whether employees protected by an order of the Interstate Commerce Commission may establish the merits of their claims based on that order through a public law board authorized under the Railway Labor Act. The issues involved herein are novel and have not heretofore been determined by this Court.

ARGUMENT

I.

THE PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION DEMONSTRATE THAT THE EMPLOYEES WHOSE CLAIMS ARE HERE INVOLVED ARE PROTECTED BY THE LAWS OF THE UNITED STATES.

A. Proceedings in the United States.

The various carriers applied to the Interstate Commerce Commission in 1961 for authority to merge pursuant to the Interstate Commerce Act.

The first order of the Interstate Commerce Commission rejected the proposed merger. *Great Northern Pacific and Burlington Lines Inc. - Merger, etc. - Great Northern Railway Company, et al.*, Finance Docket No. 21478, 328 ICC 460, March 31, 1966. In those proceedings, Canadian interests apparently were represented through the counsel appearing on behalf of British Columbia. The

Milwaukee Road opposed the applications because of its disadvantageous position.

The order of approval for the merger was served on December 15, 1967. *Great Northern Pacific and Burlington Lines, Inc., - Merger Etc. - Great Northern Railway Company et al.* Finance Docket No. 21478, 331 ICC 228 (1967).

The order recites that the rail network would consist of 27,000 miles of track through various states and two Canadian provinces. That rail trackage, including Canada, is described as being within those applications before the ICC. 331 ICC at 231-232. The Commission pointed out that since the earlier rejection, British Columbia supported the application, as well as several states.

The Commission gave detailed consideration to employee protection as required by Section 5(f) of the Interstate Commerce Act, Title 49, United States Code, Section 5(2)(f) and concluded that there were merger protection agreements entered into after the first order, with greater employee protection at greater cost to the new company. Page 277. Those agreements provided for attrition protection, monetary benefits, retirement allowances, and protection of earnings. Page 277.

The Commission stated further that "in the interest of uniformity and in view of applicants' willingness to extend attrition conditions to all employees, we require, as a condition of our approval of these transactions, the attrition conditions the same as set forth in the agreements mentioned above, be applied to all affected employees who have not entered into separate agreements." *Ibid* at 278-279. These employees are entitled to protection. The

claimants are members of the UTU and are employees of the Burlington Northern. They work out of Vancouver, British Columbia. Appendix, p. 17. They are protected employees under the Interstate Commerce Act. Appendix, p. 17. These claimants are employed in a broad geographic seniority district which includes parts of the United States and British Columbia. Appendix, p. 86. The resolution of the claims here involved is the interpretation and application of transition factors in the Merger Protection Agreement between the BLE and the BNI.

B. The Merger Procedures in Canada Demonstrate that Employee Protection was to be Accorded by the Laws of the United States.

The procedures involving the Burlington Northern merger as they occurred in Canada demonstrate that it was the intention of all parties and the Canadian authorities that employee protection would be granted under the laws of the United States. Furthermore, as the record before the Court of Appeals here demonstrates, the Canadian Labour Code does not grant this petitioner any remedy under Canadian law. The Court of Appeals, slip opinion p. 6, concluded that the employee protection effort attempted by this petitioner is a matter for the Canadian courts. However, the Canadian Labour Code specifically forecloses any such remedy. The Court of Appeals had the relevant provisions of the Canadian Labour Code. Section 158 provides for arbitration. Section 158(1) provides that an arbitration decision may be referred to the Canada Labour Relations Board by the arbitrator, the arbitration board, the Minister, or any party. Section 107

(1) defines parties as restricted to the collective bargaining representative. This petitioner seeks this protection not as a collective bargaining representative but rather as a grievance representative as designated by the employees pursuant to the Railway Labor Act, Title 45, United States Code, Section 153 Second. There are no Canadian remedies available to this petitioner. The only party that could have sought arbitration in Canada is the respondent BLE, which instead of proceeding pursuant to the Canadian Labour Code proceeded pursuant to the United States Interstate Commerce Act and the United States Railway Labour Act and established an arbitration with the respondent Burlington Northern pursuant to the agreement enforced by the ICC in its order of approval.

The Canadian Senate considered evidence from the standing committee on transport and communications. Appendix, 118. The proceedings on May 20, 1965, pointed out that the merged carriers would involve some 24,000 miles of track in the United States and 130 miles of railway in the province of British Columbia. Appendix, 119. During the hearing on May 20, 1965, remarks by George D. Finlayson, QC. Special Counsel, stated that:

> The only operation is the one that is owned by the Great Northern in British Columbia, and it is going to carry on in the same way it is being carried on now. There is no reason why the employees should be affected in any way. Appendix, 122.

Louis Torinus, General Solicitor of the Great Northern in the United States, described the merger agreement, Article X, which refers to pension benefits. Appendix, 123. He was asked by Senator Croll about the employee working agreements, and Mr. Torinus said:

> Under the merger agreement the new company assumes all the obligations of the constituent companies, which would include any contractual obligation under collective bargaining agreements. Appendix, 124. * * *
>
> Mr. Torinus: In the United States, in the event of a merger, the Interstate Commerce Commission passes upon whether or not the merger is in the public interest, and as a part of its duty, under the Interstate Commerce Act in the United States, it must consider the effect upon employees. It imposes in its orders for approving mergers in the United States certain provisions for the protection of employees. It has quite a long history of merger decisions which impose these conditions.
>
> That matter was considered extensively in the merger proceedings here involved, and the examiner has recommended the imposition of protective conditions for the benefit of employees. These are embodied in the examiner's proposed report and are in accordance with the decisions which the Interstate Commerce Commission has made in earlier merger cases. Appendix, 125.

The Queen's Counsel further described the merger as one which "really involves the companies in the United States but to a certain extent it also affects the operations in Canada." Appendix, 128. Further questioning of the Queen's Counsel by Mr. Deachman pointed out that "perhaps I should know this, but in effect you do not operate as a company in Canada, you operate running rights into Canada at those points, or is that so?" The Queen's counsel answered:

> * * * So far as the Great Northern is concerned, it actually owns 130 miles of line in British Columbia. and it operates there.
>
> Mr. Deachman: It operates not as a Canadian company but as a United States company with ownership of lines in Canada as, for example, does the Canadian National Railways across a section of Maine. Is that not right?
>
> Mr. Torinus: That is substantially correct, yes. Appendix, 131.

II.

ADMINISTRATIVE AND JUDICIAL DECISIONS CLEARLY EXTEND WAGE GUARANTEES TO THESE CANADIAN EMPLOYEES OF BURLINGTON NORTHERN.

The history of the Interstate Commerce Commission, as well as the text of the Act, illustrates that the Commission does have power to protect the earning capacity of employees of a company merged under the authority of the ICC even when those employees perform their work in Canada. State action may have repercussions beyond the state lines without judicial significance if the action be not that which the Constitution forbids. *Osborn v. Ozlin*, 310 U.S. 53, 60 S.Ct. 758, 761 (1940). Congress has the power to extend law to cover work performed in foreign countries. *Foley Brothers v. Filardo*, 336 U.S. 281, 69 S. Ct. 575, 577 (1949).

This Court, in *Canada Packers Ltd. v. Atchison, T. & S.F. Ry. Co.*, 385 U.S. 182, 87 S.Ct. 359 (1966), reviewed the power of the ICC to determine the reasonableness of joint through international freight rate. A shipper had contested the reasonableness of a rate from New Mexico to

Canada. The ICC ordered reparations because the rate was unreasonable. The Court stated:

> The provisions of the Interstate Commerce Act apply not only to transporation within the United States but to transportation from or to any place in the United States to or from a foreign country 'but only insofar as such transportation * * * takes place within the United States.' 24 Stat. 379, as amended, 49 U.S.C. Sect. 1(1). * * * As an original matter might well be considerable merit in this position. But the contrary view of the Commissions is one of long standing, * * * squarely held that where a carrier performing transportation within the United States enters into a joint through internatioal rate covering transportation in the United States and abroad, the Commission does have jurisdiction to determine the reasonableness of the joint through rate and to order the carrier performing the domestic service to pay reparations in the amount by which that rate is unreasonable. 87 S.Ct. at 360.

The Court there stated that the long standing construction of the statute by the ICC and the Supreme Court had not produced any particularly unfortunate consequences and Congress had not changed the rule. The decision is directly on point with the issue before this Court, whether there is a constitutional bar to the ICC's extension of protection to employees whose companies have merged under the laws of the United States.

Canada Packers was followd in *Commonwealth of Pennsylvania v. ICC*, CADC Cir., 561 F.2d 278 (1977). The Court there considered the action of the ICC in prescribing rules requiring the filing of voluntarily estab-

lished joint through rates for international transportation participated in by domestic rail, motor, or water carriers regulated by the ICC and ocean carriers under the Federal Maritime Commission. The Court reviewed the history of the ICC and pointed out that Section One (1) of the Interstate Commerce Act defines the parties subject to regulation. and the section includes carriers transporting passenger or property from or to any place in the United States to or from a foreign country insofar as the transportation occurs within the United States. 49 U.S.C. Section One (1). Section 1(2) of the Act, provides jurisdiction over transportation described in Section One (1). 49 U.S.C. Section 1(2). The early provision of Section One (1) established jurisdiction with the ICC over foreign commerce only to those countries adjacent to the United States. but this was changed in 1920 to establish ICC jurisdiction over transportation from or to any place in the United States to or from a foreign country. The Court pointed out that the ICC declined jurisdiction over certain foreign commerce as a "self-imposed restriction on jurisdiction." 561 F.2d at 286-287. Section 6(12) of the Act provides for the filing of tariffs on joint rates between railroads and other carriers operating between United States ports and a foreign country. 49 U.S.C. Section 6 (12). The Court of Appeals followed the *Canada Packers* case and stated:

> The question in *Canada Packers* was whether the ICC was acting lawfully in going beyond *accepting* the rate tariff for filing and actually engaging in substantive regulation of the level of reasonableness of the *entire* joint rate, including the Canadian portion. For historical reasons, the Court permitted the Com-

> mission to continue its longstanding practice of determining the reasonableness of the entire joint through rate. 561 F.2d at 287.

Commonwealth of Pennsylvania referred to additional sections of the Act as an "explicit conferral of jurisdiction of the ICC to accept for filing joint through rates established by motor and ocean carriers." 561 F.2d at 288.

There is no constitutional bar to protecting persons affected by the laws of the United States even if certain events occur outside of the country.

It must be repeated that the ICC order extended protection to all Burlington Northern employees, not just a portion. The claimants who are affected by the present litigation are protected employees, as conceded by both the BNI and the BLE when they submitted the claims to their own merger disputes committee. Furthermore, these claimants have seniority not only in Canada but in the United States. Appendix, p. 86. It would certainly be beyond the intention of the ICC that the BN could transfer its employees within a seniority district from the continental limits of the United States to Canada and thereby abort some claims. If all employees be within the protection of the ICC order allowing the merger, it must be agreed that these claimants must have an arbitration remedy available to them. If the BNI and the BLE were able, as they did, to attempt a decision on the merits of these claims under the BNI-BLE disputes committee arbitration system, the merits of the claims were determined in accordance with the Merger Protection Agreement entered into only under United States law.

A case closely analogous to this one arose under the

securities laws of the United States. In *Schoenbaum v. Firstbrook*, 2nd Cir., 405 F.2d 200, *cert. den.* 395 U.S. 906, the court asserted extraterritorial jurisdiction under the Securities Exchange Act of the United States.

The Court of Appeals in *Schoenbaum* held that the Court had jurisdiction in the United States over the sales which had occurred in Canada. It stated:

> We believe that Congress intended the Exchange Act to have extraterrritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities. In our view, neither the usual presumption against extraterritorial application of legislation nor the specific language of Section 30(b) show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States, when extraterritorial application of the Act is necessary to protect American investors. 405 F.2d at 206.

This Court affirmed the District Court's approval of the ICC order granting the merger applications. In *United States v. Interstate Commerce Commission,* 396 U.S. 491, 90 S.Ct. 708 (1970), the Court pointed out that the Great Northern operated 8,200 miles of road in ten states and two Canadian provinces and that the Northern Pacific had 6,200 miles of track in seven states and one Canadian province. 90 S.Ct. at 710. The Court considered the necessary elements of the Interstate Commerce Act, including 49 U.S.C. Section 5(2)(c), which requires the

Commission is determining whether a proposed merger is consistent with the public interest considerations including the effect on public transportation, fixed charges resulting from the transaction, and "the interest of the carrier employees affected." There is, of course, no geographical restrictions in the statute or in the Commission order. This Court's opinion approving the merger has an Appendix A, a map of the new line, which shows that it does go into Canada.

III.

THIS COURT SHOULD VOID THE BN-BLE AWARD INVOLVING THE MERITS OF THE CLAIMS WHICH THE UTU SEEKS TO HAVE ARBITRATED.

Petitioner UTU in the District Court sought to establish a public law board to determine the merits of the claims of the men involved in this case. Respondent BN on August 25, 1975, without the permission of the claimants or their designated grievance representative, petitioner UTU, submitted the claims to the BN-BLE disputes committee established under the merger protection agreement between the BN and BLE. Petitioner asked for injunction against proceeding with the establishment of that disputes committee. Appendix 19-21. Proceedings before that disputes committee were delayed from time to time. During the first appeal of this matter to the Court of Appeals, the UTU filed a motion for an expedited hearing and injunction pending completion of appeal. That motion sought to enjoin the respondents from proceeding with the arbitration before the BN-BLE disputes committee.

The UTU contends that the award should be voided by this Court on the basis of the standing assumptions of all

parties during this litigation. Furthermore, the Railway Labor Act specifically grants to individual claimants the right to designate their grievance representative. Title 45, U.S.C., Section 152 Sixth.

The Court of Appeals held that the UTU may establish the public law board to determine merger related issues arising out of the engineer's craft. Respondents BN and the BLE purported to make those decisions.

The damage done by the respondent railroad and competing union were apparently understood by the Court of Appeals in its first opinion, Appendix B. There the Court stated:

> The issue is an important one not only to the employees of the BNI who are members of the UTU-E but also to the Union itself. An aggrieved employee cannot help but feel that his interests in an arbitration proceeding will be better served if his union representative sits in on the closed door discussions that follow a presentation than if a representative of a union to which he does not belong or to which he has not entrusted the adjustment of his grievance has this privilege.

The Railway Labor Act specifically empowers the claimant to designate his own preference for handling the processing of claims. The Railway Labor Act, 45 U.S.C. 152 Sixth, provides that the carrier in dealing with grievances must confer with the representatives designated by the employees. This was violated by the respondent carrier and union in this case because after the petitioner UTU had requested arbitration, the respondent railroad and respondent BLE, a competing labor organization, set up

their own arbitration system to deprive this petitioner of its right to represent the claimants. This is barred by the Railway Labor Act as interpreted by *McElroy v. Terminal Railroad Association of St. Louis*, 7th Cir., 392 F.2d 966 (1968), *cert. den.*, 393 U.S. 1015 (1968). In *McElroy*. it was held that the Federal Courts have power to enforce the individual employee's rights to select his grievance representative. The respondents in the present case did precisely what is barred by the Railway Labor Act, that is that the respondents established a system which supposedly arbitrated the claims and denied the claims although neither party had been selected or authorized by the individual claimants. This was known to the respondents throughout and never denied. It has been conceded throughout that this petitioner is the designated grievance representative of the claimants involved. Without judicial enforcement of the right to represent these people, this petitioner will be unable to exercise its rights, and the individual claimant's rights, under the Railway Labor Act for arbitration for claims based upon the merger protective agreement required by Section 52F of the Interstate Commerce Act.

The ironic part of this is that the respondent BLE, which is the collective bargaining representative in Canada, did not take the proper remedy to protect these claimants under the Canada Labour Code. Yet, the Court of Appeals here has refused to void the decision of the respondent's arbitration proceeding on the theory that this United States arbitration is a matter for the Canadian Courts. That is a legalistic fiction that operates only to the disadvantage of the claimants who have sought this petitioner to represent them in their grievances.

CONCLUSION

The petitioner urges the Court to grant a Writ of Certiorari to the Court of Appeals to review the decision of March 19, 1980 and protect the right of individual claimants to designate this petitioner to represent them in arbitration on claims whose contractual base in a merger protective agreement entered into pursuant to the United States laws, the Interstate Commerce Act, and the Railway Labor Act, which merger protective agreement anticipated that employees would be working in Canada; and the work giving rise to the claim in this case was performed in Canada. That was clearly intended by all parties and the Interstate Commerce Commission and the Court should review the Court of Appeals decision denying our relief.

Respectfully submitted,

PATRICK J. FOLEY
NORMAN PERL
RICHARD G. HUNEGS
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1458

General Committee of Adjustment, United Transportation Union E, Burlington Northern, Inc., Great Northern Segment,

Appellant,

vs.

Burlington Northern, Inc., Brotherhood of Locomotive Engineers,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: December 6, 1979

Filed: March 19, 1980

Before HEANEY and HENLEY, Circuit Judges, and SCHATZ, District Judge.*

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*The Honorable Albert G. Schatz, United States District Court for the District of Nebraska, sitting by designation.

HEANEY, Circuit Judge.

This matter is before the Court for a second time. When it was first here,[1] we made it clear that employees of Burlington Northern, Inc. (BNI), who are members of the United Transportation Union-E (UTU-E) working as engineers in the United States, have a right to have their merger-related disputes[2] decided by a Public Law Board on which the UTU-E is represented. As we there stated:

> The issue is an important one not only to the employees of the BNI who are members of the UTU-E but also to the Union itself. An aggrieved employee cannot help but feel that his interests in an arbitration proceeding will be better served if his union representative sits in on the closed door discussions that follow a presentation than if a representative of a union to which he does not belong or to which he has not entrusted the adjustment of his grievance has this privilege. Yet, the employee's position on the seniority roster may be such that it is important to him to maintain his membership in the UTU-E. Moreover, an employee may have strong personal feelings for wanting to maintain membership in the union of his choice and to have that union process his grievances, including those that may be merger-related.

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[1]*Gen. Committee of Adjust. v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977).

---

[2]The underlying labor dispute involves the question of whether wage guarantees to engineers employed by Burlington Northern, Inc. (BNI) are to be adjusted downwards as a result of a settlement under the Canadian Labour Code which reduced the work week for railway engineers from six to five days.

> The UTU-E is certain to be affected if it loses the right to sit as a member of arbitration panels adjusting merger-related grievances. Some firemen, who might otherwise choose the UTU-E, will join the BLE [Brotherhood of Locomotive Engineers] simply because they will want the most effective representation possible. The problem is compounded because the line between merger-related grievance and those arising out of collective bargaining agreements is one that cannot always be drawn with certainty.

Gen. Committee of Adjust. v. Burlington Northern, Inc., 563 F.2d 1279, 1284 (8th Cir. 1977).

We noted, however, that there was a conflict in the record as to whether the employees in question worked exclusively in Canada. The BNI asserted that such was the case. The Union took the position that at least one of the employees involved performed some work in Seattle, Washington. *Id.* at 1285-1286.

We also noted that the UTU-E presented evidence that a long-standing custom and practice existed between the UTU-E and the BNI and its predecessors under which the parties agreed that work performed in Canada would be subject to the dispute settlement provisions of the Railway Labor Act. The BNI took a contrary position. *Id.*

We then disposed of the issue raised with respect to work performed exclusively in Canada by holding that the right to have a Public Law Board created "does not extend to claims submitted by employees who perform the disputed work exclusively outside the territorial limits of the United States." *Id.* at 1286. We specifically left open

the question of whether jurisdiction of a Public Law Board over such disputes can be conferred by custom and practice and whether such a custom and practice exists. Finally, we remanded the matter to the district court to determine the quetsions left open and to determine whether the disputed work was performed exclusively in Canada.

On remand, the UTU-E conceded for the first time that the engineers filing the claims are yard engineers working in BNI's Vancouver, British Columbia, yards and are employed exclusively in Canada. It presented evidence, however, that a long-standing custom and practice exists between the UTU-E and BNI to submit merger-related disputes involving employees who work exclusively in Canada to a Public Law Board created pursuant to the Railway Labor Act.

The trial court, relying on our opinion in *United Transp. U. Loc. L. No. 31 v. St. Paul Union Depot Co.*, 434 F.2d 220 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971), held that to establish a long-standing custom and practice, the conduct of the parties must encompass a continuity, interest, purpose and understanding which elevates a course of action to an implied contractual status. We find no error in this holding.

> The trial court also found that the evidence does not support UTU's contention that there has been a long-standing custom and practice to submit such disputes to a Public Law Board under the Railway Labor Act. The awards UTU cites are distinguishable on their facts as (1) involving disputes in connection with employees involving disputes in connection with employees whose runs were international in scope in-

volving a major portion of the route and time on the job within the United States, (2) involving a dispute under a collective bargaining agreement, the resolution of which would be the same in both countries under principles having application to working conditions common to both countries, or (3) involving a dispute where it was specifically agreed to by the parties that the matter should be arbitrated by a Public Law Board.

General Committee of Adjustment, etc. v. United States of America and Burlington Northern, Inc., Civ. 4-75-444, slip op. at 4 (D. Minn., May 17, 1979).

This finding, while open to question, is not clearly erroneous: (1) Fewer than ten disputes involving work performed in Canada have been submitted to Public Law Boards established pursuant to the Railway Labor Act by the UTU-E and the BNI or its predecessors over the last forty years. (2) Many of the disputes involved employees whose runs were international in scope involving a major portion of the route and time on the job within the United States. (3) The remaining disputes involved questions under a collective bargaining agreement, the resolution of which would be the same in the United States and Canada under principles having application to working conditions common to both countries.[3]

Here, since the dispute does not involve employees having runs that are international in scope and the question at issue is unique to Canadian employees working exclu-

[3]The third reason given by the district court for holding that no long-standing custom and practice had been proved was that the parties had specifically agreed to submit the prior matters to a Public Law Board. We give this reason no weight on our affirmance.

sively in Canada, the dispute is distinguishable from those which in the past, have been submitted to Public Law Boards.[4]

There are two additional matters which deserve mention. First, during the course of this protracted litigation, the BNI submitted these disputes to a BNI-BLE (Brotherhood of Locomotive Engineers) merger disputes committee. On November 15, 1977, the committee issued award No. LA-E, which favored the BNI. The UTU-E asked the district court and this Court to set aside that award. The district court declined to do so, stating that the question of whether the committee acted lawfully in rendering the award should be sumitted to the appropriate Canadian authority. We also decline to set it aside believing, as does the district court, that the issue is one for the Canadian courts to determine.[5] We have held that the UTU-E has a right to have merger-related disputes involving work performed in the United States submitted to a Public Law Board on which the UTU-E is represented. It is for the Canadian tribunals to determine whether, under Canadian law, the UTU-E has the right to sit on a panel convened to decide merger-related disputes involv-

[4]In the light of our holding, it is unnecessary for us to decide whether the parties can voluntarily confer jurisdiction on Public Law Boards. We simply note that while the parties have done so on a number of occasions in the past, they have not done so here.

[5]At oral argument, counsel for the BNI stated:

> I submit that the subject matter jurisdiction lies with the Canadian tribunal * * *. The opportunity is there for them and they may well be upheld by the appropriate Canadian tribunal. My point is that we have got to get settled once and for all where they are going to go to and where we are going to look to and what body of law we are going to look at in deciding issues arising in Canada. * * * I think we should have a clear determination from this Court where the parties should go to when you have a Canadian facet of this kind involved in the issues and I submit * * * that it should be in Canada.

ing its members. Our refusal to set aside the BNI-BLE award should be given no weight by Canadian authorities. We simply defer to their judgment.

Second, for the first time in its brief on appeal, the UTU-E raised the doctrine of "International Insignificance." That doctrine would apparently hold that a United States Public Law Board should have jurisdiction over this dispute because the merger was essentially consummated and approved in the United States and because BNI's Canadian operations are insignificant compared to those in the United States. Whatever merit the doctrine may have in other contexts, it is not controlling here. We decided, on the first time around, that a Public Law Board would not have jurisdiction if the work in question was performed exclusively in Canada by Canadian employees unless the parties had conferred such jurisdiction by long-standing custom and practices. That decision was not appealed and is, therefore, the law of the case.

Costs will be taxed to the appellant.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1458

General Committee of Adjustment, United Transportation Union E., Burlington Northern, Inc., Great Northern Segment,

Appellant,

vs.

Burlington Northern, Inc., and Brotherhood of Locomotive Engineers,

Appellees.

Submitted Feb. 18, 1977.
Decided Oct. 19, 1977.

APPENDIX B

* * *

Before CLARK, Associate Justice, Retired,* MATTHES, Senior Circuit Judge, and HEANEY, Circuit Judge.

HEANEY, Circuit Judge.

The United Transportation Union E. (UTU-E) appeals from an order of the United States District Court for the

*TOM C. CLARK, Associate Justice, Retired, now deceased, sat by designation, participated in the conference and agreed to the disposition reflected in this opinion.

District of Minnesota granting a summary judgment in favor of the Burlington Northern, Inc., (BNI) granting the motion of the Brotherhood of Locomotive Engineers (BLE) to dismiss the plaintiff's complaint and denying UTU-E's motion for a summary judgment. The effect of the District Court's orders was to hold that the wage disputes involving locomotive engineers employed by the BNI and arising under the Merger Protective Agreement between the bargaining representative of the locomotive engineers and the BNI were to be determined by a BNI-BLE Disputes Committee rather than a Public Law Board established pursuant to the Railway Labor Act or a UTU-E-BNI Disputes Committee.

The underlying facts are briefly stated. Historically, the railroads have recruited locomotive engineers from the locomotive firemen. As a firemen gains seniority, he is exposed to the skills of an engineer. After a certain period, he is examined on his engineering capabilities. If qualified, he becomes eligible for promotion to engineer while retaining his position as a fireman. He is placed on the engineer seniority roster but also retains his position on the firemean seniority roster. With the fluctuating demand for engineers, the employees low on the engineer seniority list "ebb and flow" between positions as engineer and fireman.

The BLE for many years has been the bargaining representative for the locomotive engineers working on the BNI. Similarly, the UTU-E has been the bargaining representative for the locomotive firemen.

Prior to the merger creating the BNI, the component carriers entered into employee protective and merger

agreements with both the BLE and the predecessor of the UTU-E. These agreements provided for the preservation of employment, the guarantee of monthly earnings and the consolidation of seniority rosters and districts on the merged carriers. Subsequently, the railroads and the unions entered into implementation agreements to effectuate the employee protective and merger agreements.

The Interstate Commerce Commission granted the merger applications creating the BNI. It required that the provisions of the protective agreements be implemented and applied to all employees. The Supreme Court subsequently approved the merger.

This litigation arose when the work week for engineers employed by the BNI in Canada was reduced from six days to five days and the wage guarantees provided to engineers were affected. The engineers affected by the work shrinkage disputed the application of the transition factor used to calculate the wage guarantees. The engineers disputing this transition factor were members of both the UTU-E and the BLE. They asked the UTU-E to process their girevance. The UTU-E undertook the responsibility but was unable to resolve the dispute with the BNI. Thereafter, it asked that a UTU-E-BNI Special Board of Adjustment (SBA No. 793) be convened to determine the merits of the matter. The BNI objected, arguing that the SBA No. 793 lacked jurisdiction to hear the dispute. It agreed, however, to submit the jurisdictional issue to the SBA No. 793. The UTU-E similarly agreed. The issue submitted to the Board was:

> Pursuant to the Interstate Commerce Act, the Railway Labor Act and Special Board of Adjustment

No. 793's Agreement dated May 24, 1972, it is the UTU's position that it may refer, present and receive an award from Board No. 793 on any merger related dispute involving one or more of its member's claims and/or grievances while they are in the category of a locomotive engineer and subject to the BLE merger agreement on the BNI, and based on the so-called third party interest of providing BLE with the right to a written interpretation to Board 793's members.

Is the position of UTU correct in part or whole?

The Special Adjustment Board held:

Taking then as it finds them, the UTU (E) Merger Protective Agreements and the May 24, 1972 Agreement under the authority of which this Board functions, Special Board of Adjustment No. 793 cannot find that its jurisdiction and authority extends to the interpretation and application of the provisions of the BNI-BLE Merger Protective Agreement or implementing agreements entered into between BNI and BLE to engineers who happen to be members of UTU(E). Accordingly, the question at issue here must be answered in the negative.

The UTU-E representative on the Board dissented.

Thereafter, the UTU-E requested the BNI to establish a Public Law Board pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* The BNI rejected the request. It served notice that it was submitting the claims of the engineers to the BNI-BLE Disputes Committee even though the employees had submitted no claims to the BLE.

The UTU-E then brought action in the United States District Court for the District of Minnesota. It sought to enjoin the BNI from proceeding with the submission of the claimants' dispute to the BNI-BLE Disputes Committee and to require the BNI to submit the dispute to a Public Law Board pursuant to the provisions of the Railway Labor Act.

The District Court held:

> The UTU-E's contention that the BN has discriminated against it with respect to grievance representation is without merit. * * * [T]he BN has conceded from the start that the UTU-E has the right to represent these engineers before the BN-BLE Disputes Committee if it so desires. * * * [*McElroy v. Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7th Cir.), *cert. denied*, 393 U.S. 813, 89 S.Ct. 83, 21 L.Ed.2d 89 (1968)] does not require that the BN submit this dispute to a board upon which the UTU-E has representation. * * *
>
> The real issue * * * [is] which board under either the merger agreements or by statute has jurisdiction to consider the claims raised by these Canadian engineers. * * * In reaching a determination of this question, the Court must be mindful that the UTU-E's own Disputes Committee, a duly authorized arbitrator under the BN-UTU-E Merger Protective Agreement, held that the BN-BLE Disputes Committee was the proper forum to determine these issues.
>
> The question as to whether a Public Law Board is the proper forum to determine these issues has been

addressed by the Court of Appeals for the Eighth Circuit. In *Brotherhood of Locomotive Engineers v. North Western Railway Co.*, 314 F.2d 424 (8th Cir. 1963), the Court held the arbitration procedure adopted by the parties pursuant to a merger agreement approved by the ICC took precedence over the arbitration provisions contained in the Railway Labor Act. *Id.*, 314 F.2d at 433. On the basis of this decision it is clear that the plaintiff's request for the establishment of a Public Law Board pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* is without merit. * * The BN-UTU-E's Disputes Committee, Special Board No. 793, has already concluded that the proper forum for the resolution of these claims is the BN-BLE Disputes Committee. Given the limited powers of a court to review an arbitration decision, it is clear that the decision of the BN-UTU-E Disputes Committee is depositive of this litigation.

The Court's role in reviewing an arbitration decision is limited solely to determing whether the decision "draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) * * *.Viewing the decision of Special Board No. 793 in light of this standard, it is clear that its decision must be upheld. The essence of the BN-UTU-E Merger Protective Agreement is that it applies solely to firemen, not to engineers. Therefore, Special Board No. 793 correctly determined that it had no jurisdiction to consider engineers' claims arising out of wage guarantees contained in the BN-BLE Merger Pro-

tective Agreement and that the resolution of such claims resided exclusively in the province of the BN-BLE Disputes Committee.

General Committee of Adjustment, United Transportation Union E., Burlington Northern, Inc., Great Northern Segment v. United States of American and Burlington Northern, Inc., et al, No. Civ. 4-75-444 (Lord, J., Order, July 19, 1976).

[1-3] The UTU-E challenges the trial court's holding on several grounds. It initially contends that the court erred in upholding SBA No. 793's decision on the jurisdictional issue. We find little merit to this contention. Ordinarily, the question of whether an arbitration board has jurisdiction to decide a dispute is to be determined by the courts. *Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487, 491-492, 92 S.Ct. 1710, 32 L.Ed.2d 248 (1972); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *International U., U.A., A. & A. I.W. v. International T. & T.,* 508 F.2d 1309 (8th Cir. 1975). Here, however, the UTU-E consented to submit the jurisdictional issue to the Special Adjustment Board and, thus, is bound by the Board's decision.[1]

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[1]A strong argument can be made that the Special Adjustment Board incorrectly decided the jurisdictional issue. The decision departs significantly from the long practice of permitting employees to process grievances through the union of their choice and permitting the union selected to have its representative on the arbitration panel. There is no evidence to indicate that the UTU-E intended to give up its rights in this regard. To the contrary, the Merger Protection Agreement between the UTU-E and the BNI provided that the BNI would "take over and assume all contracts, schedules and agreements between (the merging carriers) and the [UTU-E] concerning rates of pay, rules, working conditions and fringe benefits * * *." Nevertheless, our func-

[4] The UTU-E next contends that the trial court gave the decision of Special Adjustment Board No. 793 a broader meaning than the Board intended. The court stated that the Board held that jurisdiction to resolve the type of claim submitted here resided exclusively in "the province of the BN-BLE Disputes Committee." The UTU-E is correct. The Special Adjustment Board No. 793 held only that it did not have jurisdiction to interpret the provisions of the BNI-BLE Merger Protective Agreement. It did not decide whether the dispute could be submitted to a Public Law Board pursuant to the Railway Labor Act. The trial court's holding that it could not, therefore, must be judged wthout reliance on the decision of the Special Adjustment Board.

In *United Transportation U. E. v. Burlington Northern, Inc.*, 470 F.2d 813 (8th Cir. 1972), we were faced with a similar problem. In that case:

> [A] dispute arose concerning the proper interpretation of [the] clause with respect to engineers employed by the railroad in the Spokane Division—the basic question being whether the engineers' or firemen's seniority lists would be used to determine which engineers were entitled to priority. The railroad decided that the firemen's seniority list should be controlling. The BLE protested that this action by the

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tion is limited solely to determining whether the arbitration decision draws its essence from the collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *International Union, etc. v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974), and we cannot say it did not do so here. Another Special Adjustment Board, Board No. 767, Preston J. Moore, neutral chairman, held that claims similar to those advanced here may be submitted to and decided by Public Law Boards established pursuant to the Railway Labor Act. The matter settled before it was referred to a Public Law Board.

carrier failed to fully comply with the terms of the February 19 agreement. It requested that the dispute be submitted to a Special Adjustment Board. The railroad agreed. There is an unresolved dispute in the record as to whether the UTU was advised of and given an opportunity to participate in the hearing.

On July 7, 1971, Special Board No. 768 entered an award in favor of the BLE deciding, in substance, that the engineers' seniority list would be controlling.

The UTU then commenced this action in District Court contending that the award of the Special Board conflicts with its interpretation of the common language in the February agreements; and that in following the award, the railroad violated its contract with the UTU.

The trial court denied relief on two alternative grounds: (1) that the dispute was a minor one within the exclusive competence of the National Railroad Adjustment Board, and (2) that the dispute is essentially a representational one within the exclusive jurisdiction of the National Mediation Board.

Id. at 815.

The UTU-E appealed. We stated in our opinion:

At oral argument, however, counsel for the unions and the railroad agreed that notwithstanding the decision of [the BNI-BLE] Special Adjustment Board No. 768, the UTU has the statutory right under Section 3, first of the National Railway Labor Act, 45 U.S.C. § 153, first, to submit this dispute to the Na-

> tional Railroad Adjustment Board, that all parties would have a right to participate in the hearing before the Board, and that all will be bound by the results reached notwithstanding the decision ofSpecial Adjustment Board No. 768. We are satisfied that counsel's agreement correctly expresses the law.

Id. at 815-816(footnote omitted).

Subsequent to oral argument, counsel for the UTU-E changed his mind. He advised the Court that he erred in making the above concession. He stated that the merger agreements between BNI and UTU-E, and BNI and BLE provided the exclusive forum for the resolution of the dispute. As his change of position was received after our opinion was written but before it was released, we added the following footnote:

> The merger agreement provides a method under which issues such as this can be resolved, but we do not beleieve that the method is an exclusive one.

Id. at 816 n.1.

We then held that a union has a right to submit merger-related disputes to a Public Law Board. No appeal was taken from the decision of this Court and no petition for rehearing enbanc was filed.[2] We are now confronted with the question as to whether we will adhere to this

[2]Subsequent to our decision, the matter was submitted to a Public Law Board in which the BLE, the UTU-E and BNI participated. The Board accepted jurisdiction of the dispute. It affirmed the award of the Special Board of Adjustment No. 768, stating that the award was "final and binding on the parties therein." It dismissed the petition of the UTU-E without prejudice. The Public Law Board was critical of our holding but *did* decide the merits of the dispute with both unions participating.

holding and permit the UTU-E to sumit this dispute to a Public Law Board and require the BNI to participate in such submission.

[5] Before answering this question, we make clear that all parties agree that in all merger-related disputes, members of the UTU-E working as engineers are entitled to be represented by the UTU-E before a BNI-BLE Special Adjustment Board. Similarly, BLE members working as firemen are entitled to be represented before a UTU-E-BNI Special Adjustment Board by the BLE. *See McElroy v. Terminal Railroad Association of St. Louis,* 392 F.2d 966 (7the Cir.), *cert. denied,* 393 U.S. 1015, 89 S.Ct. 610, 21 L.Ed.2d 559 (1968); *Brotherhood of Locomotive Eng. v. Denver & R. G. W. R. Co.,* 411 F.2d 1115 (10th Cir. 1969). We also make it clear that all parties agree that in disputes arising out of collective bargaining agreements, other than merger protective agreements, an employee not only has a right to be represented by the union of his choice but also has a right to have his union representative sit on the arbitration panel deciding the case. The employee has the right even though the contract being construed was negotiated by a rival union and even though precedents established by the rival union and the railroad are to be followed.

We finally make it clear that we have approved the decision of a UTU-E Special Adjustment Board holding that it does not have jurisdiction to hear merger-related disputes which involve the construction of the collective bargaining agreement between the BNI and the BLE.

[6] The disagreement lies only in whether a locomotive engineer, who is a member of the UTU-E and employed by the BNI, has a right to have the merger-related dis-

pute decided by a Public Law Board on which the UTU-E is represented.

The issue is an important one not only to the employees of the BNI who are members of the UTU-E but also to the Union itself. An aggrieved employee cannot help but feel that his interests in an arbitration proceeding will be better served if his union representative sits in on the closed door discussions that follow a presentation than if a representative of a union to which he does not belong or to which he has not entrusted the adjustment to his grievance has this privilege. Yet, the employee's position on the seniority roster may be such that it is important to him to maintain his membership in the UTU-E. Moreover, an employee may have strong personal feelings for wanting to maintain membership in the union of his choice and to have that union process his grievances, including those that may be merger-related.

The UTU-E is certain to be affected if it loses the right to sit as a member of arbitration panels adjusting merger-related grievances. Some firemen, who might otherwise choose the UTU-E, will join the BLE simply because they will want the most effective representation possible. The problem is compounded because the line between merger-related grievances and those arising out of collective bargaining agreements is one that cannot always be drawn with certainty.

It was to avoid these problems and to accommodate the ebb and flow between firemen and engineers that the Seventh Circuit in *McElroy v. Terminal Railroad Association of St. Louis, supra*, and the Tenth Circuit in *Brotherhood of Locomotive Eng. v. Denver & R. G. W.R. Co.,*

supra, held that members of the Firemen's Union, the predecessor to the UTU-E, could designate that Union to represent them before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while they perform the services of locomotive engineers. We would note that such representation is conceded by all parties to this dispute to include the right to have a Firemen's Union representative serve on the adjustment board. The logic that inspired the holdings in the cited cases is applicable here.

We, thus, find no reason for departing from our decision in *United Transportation U. E. v. Burlington Northern, Inc., supra,* and neither the BNI nor the BLE have advanced any practical reasons for doing so.

The BNI and the BLE argue that this Court's decision in *Brotherhood of Loc. Eng. v. Chicago & North Western Ry. Co.,* 314 F.2d 424 (8th Cir. 1963), precludes our holding that the UTU-E has a statutory right under § 3, first of the National Railway Labor Act, to submit merger-related disputes of their members to the National Railroad Adjustment Board. While this assertion is contrary to the position taken by them when previously before this Court, it deserves an answer.

In the cited case, the Brotherhood of Locomotive Engineers insisted that they had a right to strike over five jobs, which were being abolished pursuant to a merger between the Northwestern and M. & St. L. Railroads and related seniority problems. The merger had been approved by the ICC. We held that § 5 of the Interstate Commerce Act vests in the Commission broad powers to approve, authorize and facilitate mergers; and pursuant to that au-

thority, the ICC had approved a merger protective agreement which included provisions to protect employees and to adjust work realignments. We concluded that the employees did not have a right to strike over merger-related disputes. In the process, we used language which is certainly broad enough to support the appellees' point of view.[3] But we are presented with an entirely different situation. No strike is threatened and everyone agrees that the dispute will be settled by arbitration. The only question is whether the UTU-E can sit on the arbitration board that is convened to decide a claim submitted by a UTU-E member to the UTU-E and by the Union to the BNI. We hold that they have a right to do so. If they are precluded from doing so in a Special Adjustment Board, as they were here, they can process the merger-related grievances of their members through a Public Law Board established pursuant to the Railway Labor Act. *Contra, Clemens v. Central Railroad Company of New Jersey*, 264 F.Supp. 551 (E.D.Pa.1967).

We see no practical problems arising from this opinion. It simply gives the aggrieved engineer or fireman a choice of forums in merger-related disputes. It also assures the employee that a representative of his choice will be permitted to serve on the board deciding the dispute.

---

[3]We believe that the cases afford very substantial support for the view that Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of § 5 (11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.

Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of § 5 (11).
Brotherhood of Loc. Eng. v. Chicago & North Western Ry. Co., 314 F.2d 424, 431-432 (8th Cir. 1963).

There is one additional issue in this case, however, which prevents us from requiring that this particular dispute be sumitted to a Public Law Board. The BNI alleged in its answer that the trial court was without jurisdiction to order the BNI to join in convening a Public Law Board under the Railway Labor Act inasmuch as that Act does not have extraterritorial applicability to Canadian citizens employed in Canada. It alleged that the claims asserted here were all claims of Canadian citizens employed in Canada. The Union submitted affidavits reciting that a long standing custom and practice existed between the UTU-E, the BNI and its predecessors under which the parties agreed that work performed in Canada would be subject to the disputes settlement provisions of the Railway Labor Act. The affidavit further recited that the BNI had recognized the jurisdiction of the National Railroad Adjustment Board to determine claims involved in incidents arising in Canada. A subsequent affidavit filed by the Union stated that the claims of one of the employees involved work performed in Seattle, Washington. The BNI submitted counter-affidavits stating that the claimants were employed by the BNI at its yard at Vancouver, British Columbia. It submitted the original claims filed by the UTU-E with the BNI in support of tis position.

The issue of the applicability of the Railway Labor Act to Canadian Workers was discussed at trial, but no evidence was taken with respect to the factual issues raised by the conflicting affidavits. No findings were made by the trial court with respect to the issue.

This Court held in *Air Line Stewards, Etc., Ass'n v. Northwest Airlines, Inc.*, 267 F.2d 170 (8th Cir.-, *cert. denied*, 361 U.S. 901, 80 S.Ct. 208, 4 L.Ed. 156 (1959),

that the Railway Labor Act was limited to the continental United States and its territories. *See also Airline Stewards, Etc. v. Trans World Airlines, Inc.*, 273 F.2d 69 (2nd Cir. 1959), *cert. denied*, 362 U.S. 988, 80 S.Ct. 1075, 4 L.Ed. 2d 1021 (1960); *Airline Dispatchers Ass'n v. National Mediation Board*, 89 U.S.App.D.C. 24, 189 F.2d 685, *cert. denied*, 342 U.S. 849, 72 S.Ct. 77, 342 U.S. 849 (1951); *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees Robert W. Blanchette, et al., Trustees of the Property of Penn Central Transportation Company*, Doc.No. CL-21125, National Railroad Adjustment Board Award No. 21413 (February 18, 1977).

[7] In the light of these decisions, an initial determination must be made as to whether the disputed work was performed exclusively in Canada. We cannot make that determination from this record. It must be made by the trial court.

If it is determined that the work was performed exclusively in Canada, then the trial court must determine whether there was a long standing custom and practice by the UTU-E and the BNI to submit such disputes to a Public Law Board. If that question is answered in the affirmative, a decision must be made as to whether jurisdiction can be conferred on a Public Law Board by custom and practice. We defer answering that question until the trial court makes appropriate factual findings and expresses its opinion on the matter.

In summary, we hold that the UTU-E has a right to submit merger-related disputes to a Public Law Board established pursuant to the Railroad Labor Act and has

the right to be represented on the Public Law Board deciding the disputed issues. The disputed issues are to be decided in accordance with interpretations based on the collective bargaining agreement by the bargaining agent of the employees submitting the claims. We further hold, however, that the right to have a public Law Board created does not extend to claim submitted by employees who performed the disputed work exclusively outside the territorial limits of the United States. We leave open the question of whether jurisdiction to decide disputes can be extended to such work by custom and practice. We remand to the District Court for action not inconsistent with this opinion.

Each party to this appeal will bear its own costs.

Supreme Court, U. S.
FILED
MAY 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-1748

IN THE

Supreme Court of the United States

October Term, 1979

GENERAL COMMITTEE OF ADJUSTMENT,
UNITED TRANSPORTATION UNION E.,
BURLINGTON NORTHERN INC.,
GREAT NORTHERN SEGMENT,
Petitioner,

v.

BURLINGTON NORTHERN INC. and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

BRIEF OF BURLINGTON NORTHERN INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. 79-1748

GENERAL COMMITTEE OF ADJUSTMENT,
UNITED TRANSPORTATION UNION E.,
BURLINGTON NORTHERN INC.,
GREAT NORTHERN SEGMENT,

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v.

BURLINGTON NORTHERN INC. and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

BRIEF OF BURLINGTON NORTHERN INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent, Burlington Northern Inc. (BN), the prevailing party in the District Court and Court of Appeals, respectfully requests that the Court deny the petition for writ of certiorari. This brief in opposition has been organized in the same manner provided by Supreme Court Rule 23 for the petition.

OPINIONS BELOW

Omitted from the petition for the writ of certiorari were the opinions of the District Court, and to be in full compliance with Supreme Court Rule 23. 1.(a), the decision of the Honorable Miles W. Lord, United States District Judge, dated May 16, 1979; the memorandum decision and recommendation of the Honorable Patrick J. McNulty, United States Magistrate, dated October 18, 1978, and the decision of Judge Lord, dated July 19, 1976, which was before the Court of Appeals in *General Committee of Adjustment v. Burlington Northern Inc.*, 563 F.2d 1279 (8th Cir. 1977), are appended hereto in an Appendix at pages A-1, A-12, and A-33, respectively.

The District Court decision at A-1 is the decision from which the United Transportation Union (UTU) appealed to the Court of Appeals in the instant case. The memorandum decision and recommendation of the Magistrate at A-12 was the result of the previous referral of those issues to him by the District Court. The District Court's opinion at A-33 deals with issues not directly involved in this case, although it is one of the decisions below forming a part of the judicial history of this case.

REASONS FOR ISSUING WRIT OF CERTIORARI NOT PRESENT IN PETITION

In the instant case, the Court of Appeals decided a Federal question in full and complete harmony with decisions of this Court, and to our knowledge there are no conflicting decisions of other Courts of Appeals. This will be demonstrated more fully in the Argument section of this brief.

QUESTIONS PRESENTED

I.

Whether UTU can force the convening of a public law board under Section 3 Second of the Railway Labor Act, 45 USC §153 Second, over labor claims of BN locomotive engineers employed in BN yards at Vancouver, British Columbia, Canada, which claims stem from a reduction of the Canadian work week under amendments to the Canada Labour Code and from a corresponding application of an agreed-to transition factor adjusting employee merger compensation guarantees approved by the Interstate Commerce Commission and Canadian authorities for application in both the United States and Canada.

II.

Whether Arbitration Award 1 A-E of the disputes committee established by Section 10 of the employee merger protective agreement, which meets the labor arbitration requirements in the Canada Labour Code and which upholds application of the transition factor, should be voided by a United States Court when the issues resolved by it were exclusively Canadian in character.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Railway Labor Act:

45 USC §151 First:

The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier

where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

45 USC §151 Fifth:

The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Interstate Commerce Act:

49 USC §1 (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipeline, or partly by pipe line and partly by railroad or by water

— from one State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, * * *

Canada Labour Code:

155. (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged violation.

* * *

156. (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed by any court.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of his or its proceedings under this Part.

* * *

157. An arbitrator or arbitration board

(a) shall determine his or its own procedure, but shall give full opportunity to the parties to the proceeding to present evidence and make submissions to him or it;

(b) has, in relation to any proceeding before him or it, the powers conferred on the Board, in relation to any proceeding before the Board, by paragraphs 118(a), (b) and (c);

(c) has power to determine any question as to whether a matter referred to him or it is arbitrable; and

(d) where

(i) he or it determines that an employee has been discharged or disciplined by an employer for cause, and

(ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration,

has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

157.1 Where a difference described in subsection 155(1) is submitted to an arbitration board, the decision of a majority of those comprising the board is the decision of the board, but if a majority of those comprising the

board cannot agree on a decision, the decision of the chairman of the board is the decision of the board.

* * *

RESTATEMENT OF FACTS

The underlying labor claims giving rise to this litigation resulted from the imposition of an agreed-to transition factor adjusting BN merger compensation guarantees in connection with settlement of litigation arising under the Canada Labour Code wherein reduction of the Canadian work week from six to five days was made applicable to Burlington Northern employees in Canada. The labor claimants are within that group since they are locomotive engineers employed exclusively in BN's Vancouver, British Columbia yards.

In submitting the claims on behalf of each of the five yard engineers in question, UTU in five identical letters, referred to them as:

> "* * * working in yard service in Vancouver—New Westminster, B.C. He was in this service at said location during his entire test period and has been ever since.
>
> "The Canada Labour (Standards) Code, Parts I to IV, which contain the actual labor standards, came into force July 1, 1965. The pertinent part of the Code limiting employees to 40 hours a week was in effect during Engineer [Ferguson's, Dallas', Munro's, Bandy's, Garisto's] test period."

In addition to obtaining authorization to merge its properties and operations in the United States, *Great Northern Pacific & Burlington Northern Lines Inc.—Merger, etc.*, 331 I.C.C. 228 (1967), *aff'd. sub nom., United States v. United States*, 296 F.Supp. 853 (D.D.C. 1968), *aff'd. sub nom.*,

United States v. Interstate Commerce Commission, 396 U.S. 491 (1970), Burlington Northern had also received approval for the merger of its Canadian properties and operations in special legislation enacted by the Canadian Parliament plus subsequent administrative and executive authorizations. Both Houses of the Canadian Parliament and subsequently the Canadian Transport Commission and the Governor General in Council gave consideration to the applicable merger protective agreement between BN and the Brotherhood of Locomotive Engineers (BLE), the collective bargaining representative for locomotive engineers, in approving the merger of lines and operations within the Dominion of Canada. See, *Statutes of Canada*, 14 Eliz. II, Chap. 23 (1965); Parliament of Canada, Senate Rept. of Standing Cmte. on Transp. and Communications (May 20, 1965); *In the Matter of the Application of Great Northern Pacific and Burlington Lines Inc.* * * *, File No. 44506.2, Canadian Transp. Comm'n. (May 7, 1968); and Certification and Approval of the Governor General and Council dated May 8, 1968. Evidence that the issue of employee protection was to be considered by the Canadian authorities in approving the merger can be found in the transcript of hearings before the Canadian Senate Committee on Transport and Communications where the Queen's Council in response to an inquiry stated:

> "* * * if for some reason the Board of Transport Commissioners are not satisfied on that point [protective conditions for the benefit of employees], I assume that in the public interest they would not recommend the merger." (Apx. 125)[1]

---

[1] References to "Apx." are to the Appendix before the Court of Appeals in No. 76-1910, *General Cmte. of Adj., UTU v. Burlington Northern Inc. and Brotherhood of Loco. Engr.*, 563 F.2d 1279 (8th Cir. 1977).

The question of approval of the BN merger with employee protective conditions was thus before legislative, administrative and executive branches of the Canadian Government.

The issue of whether the so-called transition factor is applicable to the five claimants in the instant case in determining the amount of their guaranty pay was placed before the Dispute Committee under Section 10 of the BN-BLE merger protective agreement. In issuing Award No. 1A-E, which the UTU wants voided, the Disputes Committee found that they were not on a five day week during the test period under the merger protective agreement for determining their wage guarantees, and it was thus proper to adjust their test period earnings by applying the transition factor to reflect the reduction of the Canadian work week. (Docket Entry No. XIV, pp. 61-65). The effect of that Award in no way changed the compensation guarantees or working conditions of the claimants since it upheld BN's position that the transition factor was correctly applied to them.

On these facts, plus the additional finding that BN and UTU had not established a custom and practice of referring exclusively Canadian matters of this nature to a Railway Labor Act Board, the District Court and the Court of Appeals viewed the case as being truly Canadian in nature to be resolved in accordance with the Canada Labour Code and beyond the jurisdiction of a Railway Labor Act Board of Adjustment.

ARGUMENT

Congress expressly limited the geographic scope of the Railway Labor Act in 45 USC §151 First by defining a "carrier" subject to its provisions to include a "railroad, *subject to the Interstate Commerce Act,* * * *." Section 45 USC §151 Fifth defines the term "employee" to include "every person engaged in the service of a *carrier* * * * who performs any work defined as that of an employee * * * in the orders of the Interstate Commerce Commission now in effect, * * *." The Interstate Commerce Act in 49 USC §1(1) states that its provision shall apply to common carriers in interstate or foreign commerce *"but only in so far as such transportation takes place within the United States."*[2] (Emphasis added.)

Thus, the clear Congressional mandate by incorporating the geographic limitations of the Interstate Commerce Act in the Railway Labor Act is to limit the scope of the latter to labor matters occurring within the United States, including its Public Law Board provisions in Section 3 Second. Even absent such a Congressional mandate, this Court has held time and again that Congressional enactments do not have extraterritorial effect unless there is a clear Congressional intent to the contrary.

In *Foley Bros. v. Filardo,* 336 U.S. 281, 285-86 (1949), it was held that the eight-hour law (now the Fair Labor Standards Act) does not apply to American citizens seeking time and one-half pay for working in excess of eight hours a day while employed on construction projects by an Amer-

[2] Title 49 USC §1(1) was on October 17, 1978, revised and recodified in 49 USC §10501, expressly limiting the Interstate Commerce Commission's jurisdiction to the "extent that transportation is in the United States * * *", and as stated in the Title to P.L. 95-473, it was an enactment "without substantive change [in] the Interstate Commerce Act."

ican contractor in Iran and Iraq under a contract with the United States Government. Similarly, *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 21-22 (1963) held that the National Labor Relations Act does not displace the Honduran Labor Code under much more questionable circumstances than here. Another example, this Court in *New York Cent. R.R. v. Chisholm*, 268 U.S. 29, 32 (1925), limited the Federal Employers Liability Act, 45 USC §§51-60, to railroad employee injuries occurring within the United States, and recognized that extension of such legislation to foreign countries "would be an interference with the authority of another sovereign state, contrary to the comity of nations * * *." *Id.* at 32.

There are, of course, numerous Courts of Appeals cases holding that the Railway Labor Act has no extraterritorial application. *Airline Stewards and Stewardesses Ass'n. v. Northwest Airlines*, 267 F.2d 170, 175 (8th Cir. 1959), *aff'g.* 162 F.Supp. 684 (D. Minn. 1958), *cert. denied*, 361 U.S. 901 (1959); *Airline Stewards and Stewardesses Ass'n. v. Trans World Airlines*, 273 F.2d 69 (2nd Cir. 1959), *cert. denied*, 362 U.S. 988 (1960); *Airline Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 849 (1951).

We are unaware of any decision holding to the contrary. Thus, uniformly, the Courts of Appeal and this Court all agree that the Railway Labor Act and similar legislation have no extraterritorial application to employees working outside of the United States.

Contrary to what petitioner would have us believe the Interstate Commerce Commission order authorizing the Burlington Northern merger in *Great Northern Pacific & Burlington Lines Inc.—Merger, etc., supra*, 331 I.C.C. 228 (1967), did not extend to Canadian employees of Burlington

Northern nor to Burlington Northern operations in Canada. That, of course, was the clear understanding of the Canadian legislative, administrative and executive authorities in approving the BN merger in Canada.

The cases cited by petitioner in arguing to the contrary are clearly inapposite. For example, *Canadian Packers Ltd. v. Atchison, T. & S. Fe Ry.*, 385 U.S. 182 (1966), lends it no support since this Court held that with respect to a joint through rail rate between the United States and Canada, the Interstate Commerce Commission had jurisdiction to order the carrier performing the service under the challenged rate within the United States to pay reparations in the amount by which the rate is determined to be unreasonable. However, the holding does not affect the carrier performing service in Canada, which like the claimants in the instant case, was beyond the jurisdiction of the I.C.C. This distinction is discussed in *Porter Co. v. Central Vermont Ry.*, 366 U.S. 272 (1961), where it was concluded that, "The affected *transportation within this country* was that 'from a foreign country' over which §1 (a) [of the Interstate Commerce Act] specifically gives the Commission jurisdiction, and the order did nothing more than direct railroads engaged in that transportation to adjust their transportation practices *'within the U.S.'* in such a way as to eliminate illegal discriminations." *Id.* 274-75 (Emphasis added.)

The ICC's view of its rate jurisdiction in the instance of international rail movements is succinctly stated in *Citizens Gas and Coke Utility of Indianapolis, Indiana v. Canadian National Rys.*, 325 I.C.C. 527 (1965), where it states:

> "Therefore, having jurisdiction over the domestic participating carriers, we consider joint rates for the entire movement, local rates to the border points, and factors

> of combinations which do not break at the border. * * * This is done solely to determine the lawfulness of that portion of the rates applicable to transportation within the United States. We exercise our jurisdiction to decide as to the lawfulness of that portion by issuing orders to the participating carriers under our jurisdiction, which carriers are to remove the unlawfulness thereof; i.e., insofar as such transportation takes places within the United States. * * * We do not have jurisdiction to prescribe rates for the future to foreign destinations." *Id.* at 531. (Citations omitted.)

Further distinction is found in another case cited by UTU, *Pennsylvania v. Interstate Commerce Commission,* 561 F.2d 278 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978). There the Court of Appeals viewed *Canada Packers* as upholding "the longstanding practice of the ICC in accepting [for filing] joint rate all-rail tariff to points in Mexico and Canada." *Id.* at 287. However, the D.C. Circuit went on to state as follows:

> "[T]he Interstate Commerce Act expressly limits the exercise of ICC jurisdiction with the phrase 'but only insofar as such transportation takes place within the United States' * * *. *There is a vast distinction between accepting a joint through rate for filing and regulating the foreign segment of the transportation involved. The former is possible without involving an invalid extension of regulatory power over practices clearly outside the scope of the Act; the latter is not.*" *Id.* at 291. (Emphasis in original. Footnote omitted.)

Additionally, UTU's reliance on *Schoenbaum v. Firstbrook,* 405 F.2d 200 *modified en banc,* 405 F.2d 215 (2d Cir. 1968),

cert. denied, 395 U.S. 906 (1969), is also misplaced inasmuch as there the court found that "Congress intended the Exchange Act to have extraterritorial application * * *" to protect American investors in their purchases of foreign securities and domestic securities from improper foreign transactions. *Id.* at 206. Here, of course, the expressed intent of Congress in the Interstate Commerce Act, 49 USC §1, adopted by reference in the Railway Labor Act, 45 USC §151, limits the territorial scope of the latter to transportation within the United States.

This Court's observations in *United States v. Interstate Commerce Commission,* 396 U.S. 491 (1970) of the extent and breadth of Burlington Northern's operations upon merger to include lines in this country and Canada as well as the ICC's observations in that respect are nothing more than recognition of the facts in the record. Those observations and findings certainly do not, by any stretch of the imagination, constitute an assumption of jurisdiction over Burlington Northern's Canadian operations and properties. Indeed, there would be no reason for merger authorization from the Canadian legislative, administrative and executive branches if the ICC had jurisdiction. Rhetorically, we wonder what the reactions of the Canadian Government would be if this Court were to hold that the Interstate Commerce Act and Railway Labor Act extend extraterritorially to Canada in matters relating to the BN merger and to the matters *sub judice.*

Finally, there can be no question that both the District Court and the Court of Appeals acted entirely properly in holding that they had no jurisdiction to void Award No. 1A-E of the Section 10 Disputes Committee in the BN-BLE

merger protective agreement. The Award involving exclusively Canadian issues as it does, must be dealt with by appropriate authority in conformity with the Canada Labour Code. It will be noted that the Disputes Committee provisions for arbitration in the BN-BLE merger protective agreement (Apx. 166-67) fully conform with the arbitration provisions of the Canada Labour Code set out in Sections 155 through 157. It has always been BN's position that the BN-BLE merger protective agreement meets the requirements of the laws of both countries, the United States and Canada, including the cited arbitration provisions approved by the ICC and Canadian authorities. If UTU wishes to press its contentions with respect to that Award, it should make that effort in Canada, either before the appropriate Canadian Court or arguably before the Canadian Labour Board as a complainant under Section 101(1)(c) and 158 (1) of the Canada Labour Code.

In any event, the United States Courts simply do not have extraterritorial jurisdiction over exclusively Canadian subject matter to enter an order voiding the Award.

CONCLUSION

It is abundantly clear from not only a straight-forward construction of the Railway Labor Act incorporating by reference the geographic limitations of the Interstate Commerce Act, but also from the precedents established by this Court and in various Courts of Appeals, that the Act simply does not extend extraterritorially to employees working exclusively in Canada. The Court should therefore deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: May 16, 1980

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIV. 4-75-444

GENERAL COMMITTEE OF ADJUSTMENT,
UNITED TRANSPORTATION UNION E.,
BURLINGTON NORTHERN INC.,
GREAT NORTHERN SEGMENT,

Plaintiff,

vs.

UNITED STATES OF AMERICA and
BURLINGTON NORTHERN INC.,

Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Applicant-Intervenor.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

This case is before the Court on remand from the United States Court of Appeals for the Eighth Circuit in *General Cmte. of Adjust., United Transportation Union-E. v. Burlington Northern Inc.*, 563 F.2d 1279 (1977). In that decision, Circuit Judge Heaney held that while the United Transportation

Union (UTU or Firemen's Union) is generally entitled to sit on a public law board convened under the Railway Labor Act to decide claims submitted by engineers who were members of the Firemen's Union, the record before the Court indicated that the claimants were yard engineers working in Canada, and that therefore this Court should make findings as to "whether the disputed work was performed exclusively in Canada * * *, whether there was a longstanding custom and practice by the UTU-E and the BNI to submit such disputes to a Public Law Board * * * [and if so, whether jurisdiction can be conferred on a Public Law Board by custom and practice." 563 F.2d at 1286. The Court further recognized that the labor relations dispute must be decided in accordance with interpretations based on the collective bargaining agreement between BN and the BLE as bargaining representative of the employees submitting the claims. The Court concluded its opinion as follows:

> "We further hold, however, that the right to have a public Law Board created does not extend to claims submitted by employees who performed the disputed work exclusively outside the territorial limits of the United States. We leave open the question of whether jurisdiction to decide disputes can be extended to such work by custom and practice. We remand to the District Court for action not inconsistent with this opinion." *Ibid.*

On subsequent motions by UTU to void an award of an arbitration panel under the BN-BLE merger protective agreement and for findings and conclusions on the jurisdiction of a Public Law Board under the Railway Labor Act, together with the foregoing remand, the case was referred by this Court to Magistrate Patrick J. McNulty. After receiving briefs from the parties and hearing oral argument, he filed a Memorandum

Decision and Recommendation concluding that a Railway Labor Act board of adjustment does not have jurisdiction to decide these claims and that the award should be voided. Objections to the Magistrate's decision have been timely made.

After reviewing the evidence, briefs of counsel and hearing oral argument, the Court in conformity with the decision of the Court of Appeals enters the following findings of fact, conclusions of law and order for judgment:

FINDINGS OF FACT

1. It has been stipulated by all parties that the five individual claimants are yard engineers working in Burlington Northern's Vancouver, British Columbia, yards and were employed exclusively in Canada at all times material to their claims. That they could have exercised their seniority and obtained work in the United States, since the seniority district in which they were situated extended to some of BN's lines in western portions of this country, is not determinative nor germane to the issues framed by the Court of Appeals in that they in fact did not work here, but remained in Canada.

2. The claims arose from the imposition of an agreed-to transition factor which in effect reduced the merger protective guarantees under the BN-BLE Merger Protective Agreement, providing for guaranteed compensation as a protective condition of the Burlington Northern merger. Imposition of the transition factor was the result of the reduction of the work week from six to five days as made applicable to them through an amendment to the Canada Labour Code. The claimants have contended that the commensurate reduction of wage guarantees through application of the transition factor was improperly applied to them.

3. The BN-BLE merger protective agreement was approved by the Interstate Commerce Commission and Canadian

authorities and applies to its employees in Canada as well as the United States. This fact has been recognized by both Houses of the Canadian Parliament and the Canadian government in authorizing and approving the Burlington Northern merger of lines and operations within the Dominion of Canada. See, Statutes of Canada, 14 Eliz II, Chap. 23, 1965; Parliament of Canada, Senate, Rpt. of Standing Cmte on Transp. and Communications; *In the Matter of Appn. of Great Northern Pacific and Burlington Lines Inc. to Merge,* File No. 45060.2 Canadian Transp. Comm'n.; Certification and Approval by the Governor General in Council, dated May 8, 1968 (Affd. C. M. Illg, April 19, 1976, Exs. F, G, H, I and J; Apx. 98-141).

4. In five letters submitting the claims of each of the five yard engineers-in question, A. M. Strommen, Chairman of the Utu, in identical statements referred to each individual as,

> "* * * working in yard service in Vancouver—New Westminster, B.C. He was in this service at said location during his entire test period and has been ever since.
>
> "The Canada Labour (Standards) Code, Parts I to IV, which contain the actual labor standards, came into force July 1, 1965. The pertinent part of the Code limiting the employees to 40 hours a week was in effect during engineers [Ferguson's, Dallas, Munro's, Bandy's, Garisto's] test period." (Affd. C. M. Illg, April 19, 1976, Exs. A, B, C, D and E; Apx. 89-98).

Each of these letters goes on to state that these claims arise from litigation in Canada establishing a five day work week under the Canada Labour Code during their merger guarantee test period. In answer to a question from the Court, counsel for UTU concurred that there may be purely Canadian issues where the rights and obligations of the employees in question

would be determined by Canadian law. (Oral Arg. on Magistrate's Recommendation, November 30, 1978, Tr. 26)

5. The Court concurs with the Magistrate's findings that the evidence does not support UTU's contention that there has been a longstanding custom and practice to submit such disputes to a Public Law Board under the Railway Labor Act. The awards UTU cites are distinguishable on their facts as (1) involving disputes in connection with employees whose runs were international in scope involving a major portion of the route and time on the job within the United States, (2) involving a dispute under a collective bargaining agreement, the resolution of which would be the same in both countries under principles having application to working conditions common to both countries, or (3) involving a dispute where it was specifically agreed to by the parties that the matter should be arbitrated by a Public Law Board. (Affd. E. J. Conlin, Feb. 6, 1978)

6. While arbitration awards of Public Law Boards and the National Railroad Adjustment Board are not uniform in recognizing these distinctions as a basis for asserting or declining jurisdiction, it is clear that on less persuasive facts, the National Railroad Adjustment Board has declined jurisdiction on the basis of the extraterritorial character of the claims. The following cases involve disputes on work performed in Canada where the Board held it to be without jurisdiction to entertain the controversy. *NRAB, Third Division, Award No. 21413, Docket No. CL-211525, February, 1977 (cited by the Court of Appeals in the instant case at 563 F.2d 1286); NRAB, First Division, Award No. 11149, Docket No. 21013, Jan. 1947; NRAB, First Division, Award No. 11150, Docket No. 21482, Jan. 1947; NRAB, First Division, Award No. 11151, Docket No. 21696, Jan. 1947; NRAB, First Divi-*

sion, Award No. 14082, Docket No. 23034, Dec. 1950. (Affd. C. M. Illg, October 3, 1975, Exs. B, C, D and E; Apx. 38-69)

7. At least one case was voluntarily submitted to the Canadian Railway Board of Adjustment by a predecessor line merging into Burlington Northern and the Brotherhood of Railroad Trainmen, a union now merged into UTU. That case also involved employment taking place exclusively in Canada. *Canadian Railway Board of Adjustment No. 1, Case 579, Jan 1949.* (Affd. C. M. Illg, October 3, 1975, Ex. F; Apx. 69-84)

8. Thus the awards of United States and Canadian boards of adjustment on facts similar to those in the instant case weigh heavily against the contention that there has been a longstanding custom and practice of submitting such disputes to Railway Labor Act boards, and the Court so finds. Nor is there any other evidence of record which would persuade the Court to make different findings.

9. The issue of whether the so-called transition factor is applicable to the five claimants in determining the level of their merger guaranty pay was placed before the Merger Disputes Committee created under Section 10 of the BN-BLE Merger Protective Agreement. In issuing Award No. 1A-E, which UTU wants voided, the Disputes Committee found that they were not on a five day week during their test period under the Merger Protective Agreement for determining their wage guarantees. It reasoned that the amendment to the Canada Labour Code reducing the work week did not automatically apply to the claimants insofar as their merger guarantees are concerned, and that it was thus proper to adjust their test period earnings by application of the transition factor to reflect the statutorily mandated work week reduction. Thus, in denying these claims the Disputes Committee had before it the question of how a reduction of the work week

under the Canada Labour Code affected wage guarantees provided for in the BN-BLE Merger Protective Agreement. (Memo of BLE, Jan. 9, 1978, Apx. B)

CONCLUSIONS OF LAW

A. The history of the relationship and procedures adopted by these parties, and by others in the industry, is not persuasive of a conclusion that submission to a Public Law Board under the Railway Labor Act of Disputes arising from work performed solely in Canada is an established custom and practice which can reasonably be understood to be superimposed upon the collective bargaining agreement or the merger protective agreements as part of industrial common law. The conduct of the parties must not be merely isolated instances dictated by the circumstances of the moment to establish such custom and practice, but must encompass a continuity, intent, purpose and understanding which elevates that course of action to an implied contractual status. See, *United Transp. U. Local Lodge No. 31 v. St. Paul Union Depot Co.*, 434 F.2d 222-223 (8th Cir. 1970), *cert. denied*, 402 U.S. 946.

B. Even if such an established custom and practice had existed, jurisdiction of a Railway Labor Act Board cannot be extended to employment performed exclusively in Canada. This is not to say that the parties themselves cannot agree to an arbitration tribunal having the same or similar characteristics of a Public Law Board under the Railway Labor Act. However, the jurisdiction of such a Board under the Act cannot be invoked and imposed or sanctioned by this Court under authority of the Act. Congress has specifically limited the territorial scope of the Railway Labor Act, 45 U.S.C. §151 First, through adopting by reference the restrictive geographic coverage of the Interstate Commerce Act in 49 U.S.C. §1, which limits application of this legislation to rail transporta-

tion occurring within the United States. This was recognized by the Court of Appeals in the instant case in its holding that, "The Railway Labor Act [is] limited to the continental United States and its territories." 563 F.2d at 1286. Indeed, the Eighth Circuit earlier held in *Airlines Stewards and Stewardesses Ass'n. v. Northwest Airlines*, 267 F.2d 170 (8th Cir. 1959), *aff'g*, 162 F.Supp. 684 (D.Minn. 1958), *cert. denied*, 361 U.S. 901 (1959), that exclusions from coverage of the Railway Labor Act are applicable to anyone employed in performing services outside the continental United States and its territories. In that case the union claimed an arbitration award to be in derogation of its representative rights under the Railway Labor Act, 45 U.S.C. §152, because it permitted Northwest to bargain indpendently with persons employed on foreign flights outside the United States. In holding that a union has no such rights with respect to those employees, the Court concluded:

> "The construed exclusions from coverage under the Railway Labor Act are no way based upon race, color, citizenship or national origin. *Such exclusions are applicable to anyone employed and performing service outside of the continental United States and its territories.*" 267 F.2d at 175 (Emphasis Added.)

Accord, *Airline Stewards and Stewardesses Ass'n. v. Trans-World Airlines*, 273 F.2d 69 (2nd Cir. 1959), *cert. denied*, 362 U.S. 988; *Airline Dispatchers Ass'n. v. National Mediation Bd.*, 189 F.2d 685 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 849 (1951). The rationale supporting the policy of congress here in specifically delineating the Railway Labor Act to domestic subject matter is aptly stated in *Foley Bros. v. Filardo*, 336 U.S. 281 (1949), where it was held that the eight hour law (now the Fair Labor Standards Act) does not apply to Ameri-

can citizens seeking time and one-half pay for working in excess of eight hours a day while employed on construction projects by an American contractor in Iraq and Iran under a contract with the United States government. There, as here, there is nothing in the law,

> "* * * that is any indication of a Congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control. There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority legislative or otherwise, over the labor laws or customs of Iran or Iraq. We were on their territory by their leave, but without a transfer of any property rights to us.
>
> "The scheme of the Act itself buttresses our conclusion. No distinction is drawn therein between laborers who are aliens and those who are citizens of the United States. * * * An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose. * * *" *Id.* at 285-86.

Accord, *New York Cent. R.R. v. Chisholm*, 268 U.S. 23 (1925), which similarly limited the Federal Employees Liability Act to injuries occurring within the United States, and recognized that extension of such legislation to foreign countries "would be an interference with the authority of another sovereign, contrary to the community of nations * * *." *Id.* at 32.

C. As already noted in the findings of fact, the Dominion of Canada by special Act of Parliament together with administrative and executive actions has asserted jurisdiction over the Burlington Northern Merger of lines and operations in that country, and as reflected in the report of the Standing

Committee of Transport and Communications of the Canadian Parliament, the Merger Protective Agreements were taken into consideration in approving the Canadian portion of the Burlington Northern merger. Thus in light of the act of the assertion of jurisdiction resulting in approval of the BN merger by the Government of Canada, the following expressions by our Supreme Court in *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1962) are pertinent:

> "The possibility of international discord cannot therefore be gainsaid. Especially is this true on account of the concurrent application of the Act [National Labor Relations Act, 29 U.S.C. §151, et seq.] and the Honduran Labor Code that would result with our approval of jurisdiction.
>
> * * *
>
> "We therefore conclude * * * that for us to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.' * * * Since neither we nor the parties are able to find any such clear expression, we hold that the Board [NLRB] was without jurisdiction to order the election." *Id.* at 21-22 (Citations omitted.)

Here, of course, not only is there no expression of Congress that the Railway Labor Act and its Public Law Board provisions apply to Canadian employment, but Congress has clearly expressed a contrary intent.

D. Thus, because of the specific geographic limitations of the Railway labor Act to employment within the United States, together with the clearly exclusive jurisdiction of the arbitration tribunals under Sections 155-157 of the Canada Labour Code, c. 18 39 (1972), jurisdiction of a Railway Labor

Act Board cannot be extended to the claims in the instant case, notwithstanding what the past custom and practice of the parties may have been.

E. In view of the foregoing findings and conclusions, it would be improper for this Court to pass on the lawfulness of Award No. 1A-E of the BN-BLE Disputes Committee, since the question of whether or not the arbitrator acted lawfully in rendering the award should be submitted to appropriate Canadian authority. Furthermore, the Court notes that no alternative body exists which could legally resolve the controversy.

ORDER FOR JUDGMENT

On the foregoing findings of fact and conclusions of law, it is hereby ordered that:

1. Plaintiff's motion to determine jurisdiction of a Public Law Board is in all respects denied for the reason that a board of adjustment under the Railway Labor Act of the United States does not have jurisdiction over the facts and circumstances giving rise to the claims of the five locomotive engineers in question employed at Burlington Northern's Vancouver, British Columbia, Canada, yards.

2. Plaintiff's motion to void the award of the BN-BLE Disputes Committee convened under Section 10 of the BN-BLE Merger Protective Agreement, Award No. 1A-E, is in all respects denied for the reason that the lawfulness of such an award is beyond the jurisdiction of this Court and must be presented to the appropriate Canadian authority for decision.

The Clerk is instructed to enter judgment in accordance with the foregoing findings of fact, conclusions of law and order for judgment.

Dated May 16, 1979.

MILES W. LORD
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-75-444

GENERAL COMMITTEE OF ADJUSTMENT,
UNITED TRANSPORTATION UNION E.,
BURLINGTON NORTHERN, INC.,
GREAT NORTHERN SEGMENT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and
BURLINGTON NORTHERN, INC.,

Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Applicant-Intervenor.

MEMORANDUM DECISION AND RECOMMENDATION

At Duluth, in said District, this 18th day of October 1978.

The above-titled case came on for hearing before the undersigned United States Magistrate on July 10, 1978, pursuant to special assignment in accordance with Title 28, U.S.C. §636 (b)(1)(B). Plaintiff appeared by Patrick J. Foley, Esq., Defendant appeared by Barry McGrath, Esq., and the Intervenor appeared by Harold A. Ross, Esq.

The Court having heard the argument of counsel and considered the Memoranda of Law submitted, and due deliberation having been had,

NOW, upon all of the file, record and proceedings, makes and enters the following Memorandum Decision and Recommendation which is deemed to comply with the Federal Rules of Civil Procedure.

This case is now before the Court on remand from the Court of Appeals following an appeal of the trial court's order dated July 19, 1976. *Gen. Committee of Adjust v. Burlington Northern, Inc. (8th C.A. 1977) 563 F.2d 1279.* The case is presented on the original file and record, and one additional affidavit, pursuant to two motions by plaintiff, to-wit:

1. A motion for an order voiding awards, in respect to claims involved in this litigation, made by a merger disputes committee created under the Burlington Northern, Inc. — Brotherhood of Locomotive Engineers Merger Protective Agreement.

2. A motion for an order determining the jurisdiction of the Public Law Board.

Prior to the grant of the merger applications which created the Burlington Northern, Inc. (BNI), on March 2, 1970, the component carriers had entered into employee protective agreements, on behalf of the locomotive engineers with the Brotherhood of Locomotive Engineers (BLE) and on behalf of firemen with the predecessor Union to the United Transportation Union-E (UTU-E). The Interstate Commerce Commission in granting the merger, *331 I.C.C. 228*, and the Supreme Court in approving it, *Northern Lines Merger Cases (1970) 396 U.S. 490*, required that these protective agreements be implemented and applied to all employees of the carriers involved. The agreement between BNI and the BLE contained provisions for wage guarantees. Thereafter, the Canada Labour Code was amended to place Canadian workers, generally, on a five day work week. A sixth day, therefore, became com-

pensable at time and one-half. Originally, these railroad employees were not included under this law, but, in 1969, the BNI employees were afforded this reduced work week by agreement. The BLE merger protective agreement was supplemented to include a transition factor which is designed adjust wage guarantees, which were originally computed on a six day work week during the base period in 1967, to a five day work week. The shortened week naturally results in proportionately lower earnings as an indirect result of the change in the Canada Labour Code, and not the direct result of the merger. The engineers, who were thereby affected, disagreed with the application of the transition factor utilized by BNI to compute the wage guarantees to which they were entitled. As was their right, these engineers maintained membership in the UTU-E. *Cf., Sec. 2 Eleventh(c) Railway Labor Act, Title 45 U.S.C. § 152 Eleventh(c); Pennsylvania R. Co. v. Rychlik (1956) 352 U.S. 480.* This seemingly dual representation in the craft of locomotive engineers arises as a practical effect of the railroad's practice of promoting senior and qualified locomotive firemen to locomotive engineer status. Upon such elevation, the employee assumes low seniority on the roster of the engineers, but also maintains his high position on the seniority roster for firemen. As the demand for engineers fluctuates, seasonally or otherwise, therefore, such employee will move between the two positions on the basis of his seniority position on the engineer roster. The crafts within the railroad industry are represented by in excess of twenty separate unions. Presumably, many employees are beneficiaries of the same type internal job promotion, and it would not be unusual for a member of one union, or a non-union employee, to be represented by a collective bargaining agent in which he does not hold membership. *Cf. Railway Conductors v. Switchmen's Union*

(5th C.A. 1959) 269 F.2d 726, cert. den (1959) 361 U.S. 899. The bargaining agent for engineers has historically been the BLE and for firemen the UTU-E, or its predecessor. While working as a fireman, rates of pay, rules of employment and working conditions which have been established by the contract between the UTU-E and BNI apply, and when working as an engineer the contract between the BLE and BNI governs these areas. In this instance, although the dispute arises from their engineer's status, the plaintiffs have chosen the UTU-E to represent them. There is no question but that the dispute involves the interpretation of the provisions of the BLE-BNI merger protective agreement.

Initially, the UTU-E, having reached an impasse in settlement negotiations, attempted to have the dispute submitted to a UTU-E—BNI special board of adjustment, *(SBA No. 793)* convened under the UTU-E—BNI merger protective agreement. The BNI objected to this procedure maintaining that this board did not have jurisdiction to hear the matter. This jurisdictional issue was voluntarily submitted to SBA No. 793 by the parties. This board found that its jurisdiction was limited, by the agreement under which it was established, solely to disputes over the interpretation and application of the UTU-E—BNI merger protective agreement, and it determined that by the terms of that agreement, its jurisdiction did not extend to the interpretation and application of the provisions of the merger protection or implementing agreements entered into between BNI and BLE. The UTU-E then requested BNI to establish a Public Law Board. BNI refused, and, instead, informed the UTU-E that it would submit plaintiff's claim to the BNI-BLE merger disputes committee provided for by the BNI-BLE merger agreement. This committee, in case No. 1A-E, determined that it had jurisdiction, heard the

dispute, and issued award No. 1A-E on November 15, 1977. Prior to that time, this action had been commenced. The Complaint seeks injunctive relief prohibiting defendants from, among other things:

a) Selecting the BLE disputes committee to resolve this dispute, and

b) Refusing to establish the Public Law Board as requested by the UTU-E.

In its opinion, the Court of Appeals held, or reaffirmed prior holdings, that:

1. In employee-carrier disputes arising out of a collective bargaining agreement, other than a merger protective agreement, an employee has the right to be represented by a union of his choice and to have his union representative sit on the arbitration board.

2. The UTU-E Special Adjustment Board does not have jurisdiction to hear merger-related disputes which involve the contract between the BLE and BNI.

3. The UTU-E has a right to submit merger-related disputes to a Public Law Board and has a right to be represented on that Board.

4. That such disputes will be determined according to the interpretation placed upon the collective bargaining agreement by the bargaining agent of the employees.

5. That the *right* to have a Public Law Board created does not extend to claims arising from work performed exclusively outside the territorial limits of the United States.

These precepts are now controlling.

The issues remanded by the Court of Appeals for this Court' determination are quite narrow, although counsel has attempted to enlarge upon them. The questions which this

Court must answer are two of fact and one of law which, succinctly stated, are:

1. Was the labor upon which this suit is focused performed by claimants for BNI exclusively in the Dominion of Canada?

2. Is there a long-standing custom and practice between BNI and the unions to submit disputes arising from work performed exclusively in Canada to a Public Law Board Convened pursuant to the Railway Labor Act? *Title 45, U.S.C. §§151 et. seq.*

3. If such custom and practice exists, can it confer jurisdiction to hear and decide such disputes upon the Public Law Board convened under authority of the Railway Labor Act?

I

The first issue remanded for this Court's determination has been resolved by the parties. It is now agreed that all of the employees whose interests are represented by plaintiff, and whose rights are affected by this litigation, performed all of the labor out of which the dispute arises exclusively within the territorial limits of the Dominion of Canada.

II

To determine whether or not a custom and practice exists to the extent that it binds these parties to the submission of this dispute to a Public Law Board we must first examine the dispute to identify the essence of the controversy. This disagreement is not over a working condition. It is purely a contractual issue arising from the terms of the merger protective agreement entered into by the BLE and BNI. Secondly, it is a dispute which involves employment solely in Canada. Thirdly, its resolution is dependent upon Canadian law. (The position of claimants is that the transition factor cannot be properly applied to them because they were on a five day work week by virtue of the provisions of the Canada Labour Code and

that this law is superior to any requirements set forth in the parties' private agreements.) Without unduly restricting consideration solely to these unique facts, we must examine past actions of the parties to discern whether or not there is sufficient factual similarity in the instances where disputes between them were submitted to a Public Law Board to constitute a custom and practice which is applicable to the facts of this case.

In support of its position, the plaintiff has cited a number of cases which the railroads and unions have submitted to a Public Law Board. The cases appear to be clearly distinguishable on their facts. Each of these cases involved one of three salient circumstances which is not present here, to-wit:

A. A dispute with an employee whose run was international, but where the major portion of the route, and of the time on the job, was within the United States, or

B. A dispute for which arbitration by a Public Law Board, which clearly had subject matter jurisdiction, was specifically provided by agreement, or

C. A dispute specifically covered by a collective bargaining agreement which was uniformly applicable to services rendered in either country and the resolution of which would be identical under the labor laws of both countries.

The plaintiff has not called attention to any instance where the Public Law Board assumed jurisdiction of a labor dispute which involved the distinctive factors which make this dispute somewhat unique. Conversely, the cases brought to this Court's attention in which the work out of which the dispute arose was performed entirely in Canada, have held that the Public Law Board was without jurisdiction to entertain the controversy. *See, NRAB, 3rd Division, Award No. 21413, Docket No. CL-*

211525, Feb. 1977; NRAB, 1st Division, Award No. 11149, Docket No. 21013, Jan. 1947; NRAB, 1st Division, Award No. 11150, Docket No. 21482, Jan. 1947; NRAB, 1st Division, Award No. 11151, Docket No. 21696, Jan. 1947; NRAB, 1st Division, Award No. 14082, Docket No. 23034, Dec. 1950. Consistent with these holdings, one case, at least, has been voluntarily submitted by the Northern Pacific Railway, one of the parties to the merger creating BNI, and the Brotherhood of Railroad Trainmen, a predecessor of the UTU, to a Board of Adjustment created under the laws of Canada for this very reason. *Canadian Railway Board of Adjustment No. 1, Case No. 579, Jan. 1949.* If the determination of the issue is to be based upon a balancing of instances by number, the preponderance is clearly with defendants.

In a slightly different context, Judge Lay discussed the concept of custom and established practice in *United Transp. U. Loc. L. No. 31 v. St. Paul Union Depot Co. (8th C.A. 1970) 434 F.2d 220.* There is no reason why the precepts expounded in that case are not applicable here. There, the Court said:

> "We would agree that the prior occurrences of similar conduct should not be considered a *per se* 'practice' or 'working condition' under the Railway Labor Act. We think that an 'established practice' under the Act was intended to include only prior conduct of the parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the collective bargaining agreement. . . An 'established practice' under the Act should demonstrate not only a pattern of conduct but also some kind of mutual understanding, either expressed or implied. Thus, prior behaviour by itself, although similar to the acts in dispute, falls short of an 'established practice.' Whether prior conduct estab-

> lishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case."

To characterize a former procedure, or even an extended prior course of action, as an established practice or custom, therefore, the conduct of the parties must not be merely isolated instances dictated by circumstances of the moment, but must encompass a continuity, intent, purpose, and understanding which elevates that course of action to the more lofty rank of an implied contractual status. The history of the relationship and procedures adopted by these parties, and by others in the industry, is not persuasive of a conclusion that the submission to a Public Law Board of a dispute arising from work performed solely in Canada is an established custom or practice which can reasonably be understood to be superimposed upon the collective bargaining agreement or the merger protective agreements as part of industrial common law. In fact, the evidence clearly negates this proposition, and it is expressly found that no such common custom or practice exists.

The second issue posed by the Court of Appeals, viz:

> "If it is determined that the work was performed *exclusively* in Canada, then the trial court must determine whether there was a long standing custom and practice by the UTU-E and the BNI to submit *such disputes* to a Public Law Board." (Emphasis added.)

must, therefore, be answered in the negative.

III

To fully comply with the mandate of the remand by the Court of Appeals, however, one must assume, arguendo, that such custom and practice does exist and then must determine whether or not such custom and practice can confer jurisdiction to entertain this dispute upon a Public Law Board. An

established custom and practice is tantamount to an agreement. The question becomes, therefore, can the parties to a merger related labor dispute arising in Canada, by their agreement, confer extraterritorial jurisdiction upon an arbitration board which is established by the United States Congress? No one would contend that the parties cannot agree to dispose of disputes between them in any private manner and by any private procedure which they desire. We do not deal here with that question, but solely with the question of the power or jurisdiction of the Public Law Board to act upon such agreement. Specifically, we are dealing with the statutory subject matter jurisdiction of a Public Law Board. Jurisdiction of a publicly created body cannot be spontaneously generated. It must be rooted in the Constitution or in a statutory enactment. In this case to determine the extent of the power of the Public Law Board, we must first look to the Interstate Commerce Act. *Title 49 U.S.C.* This Act restricts the application of its provisions, where material here, to common carriers engaged in the transportation of passengers or property by a railroad—

a) From one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, and

b) From one place in a Territory to another place in that Territory, and

c) From any place in the United States through a foreign country to any other place in the United States, and

d) From any place in the United States to and from a foreign country, but only insofar as such transportation takes place within the United States. *Title 49 U.S.C. §§1(1) and 1(2).*

The Railway Labor Act, *Title 45 U.S.C. §§151-163,* where material herein, by definition, restricts the carriers subject to its provision to those carriers subject to the Interstate Commerce Act. The jurisdictional scope of the Railway Labor Act is thereby circumscribed. The Public Law Board is conceived by a mutual voluntary action of a carrier and its employees pursuant to the authority and procedure set forth in the Railway Labor Act, *Title 45 U.S.C. §153, Second.* Once properly constituted, it becomes a public body with authority to exercise the powers delegated to it by Congress. Reasoning a posteriori, one must conclude that the jurisdiction conferred upon a Public Law Board is restricted to disputes between employees and carriers engaged in three types of commercial itineraries:

1. Those which cross only domestic boundaries,
2. Those which emanate in the United States, cross an international boundary, and return to the United States,
3. Those which commence in the United States and end in a foreign country, or commence in a foreign country and end in the United States, but only to the portion of such itinerary which lies within the United States.

The statute does not address itself to wholly foreign commerce, and certainly the inference which logically follows from the proviso attached to the description of the third form of commerce is that wholly foreign commerce is excluded by omission.

The intent to attempt to regulate labor-management relationships arising wholly outside the political jurisdiction of the United States cannot be attributed to a congressional enactment in the absence of a clear expression contained in that legislation. *Foley Bros. v. Filardo (1949) 336 U.S. 281; McCulloch v. Sociedad Nacional (1962) 372 U.S. 10.* It is now firmly

established that the provisions of the Railway Labor Act do not have extraterritorial application. *General Committee of Adjustment v. Burlington Northern, Inc. (8th C.A. 1977) 563 F.2d 1279; Airline Stewards and Stewardesses Ass'n v. Northwest Airlines, Inc. (8th C.A. 1959) 267 F.2d 170, aff'ing. (Minn. 1958) 162 F. Supp. 684, cert. den (1959) 361 U.S. 901; Airline Dispatchers Ass'n. v. National Mediation Board (D.C. 1951) 189 F.2d 685, cert. den. (1951) 342 U.S. 849.* The Railway Labor Act does not create a legal right in employee or carrier to have disputes arising from employment wholly outside the territorial limits of the United States submitted to a Public Law Board established under that Act's provisions. A fortiori, the Act does not imbue subject matter jurisdiction over such disputes to a board created under its provisions. The question of whether or not an agreement between an employee organization and an employer, explicitly or impliedly by adopting a custom and practice, can imbue a Public Law Board with jurisdiction to hear and determine such dispute becomes easily answered. The scope of the coverage of the Act is clearly delineated. The breadth of the disputes which the Public Law Board is authorized to hear must be limited by the circumstances which limit the Act's application. In order to act, the Board must have jurisdiction over both the parties and the subject matter. *Phillips v. Fidalgo Island Packing Co. (9th C.A. 1955) 230 F.2d 638, rehearing den. (9th C.A. 1956) 238 F.2d 234, cert. den. (1956) 352 U.S. 944.* If the subject matter is not one to which the impact of the act is directed, the parties cannot by agreement or consent write a provision into the Act to affect an enlargement of the authority granted the Public Law Board by Congress. This invades legislative prerogative. Congress created the system, and Congress alone possesses the authority to grant power to the Board. One would readily

recognize that parties to a collective bargaining agreement in the automobile manufacturing or drug industry could not by agreement confer mediation or arbitration powers on the Public Law Board. Obviously, the Railway Labor Act does not give the Public Law Board subject matter jurisdiction over disputes arising in these industries. There is some distinction in this example, by reason of the occupational relationship in the instant case, but can one discern a difference when the scope of the Act, which is carefully limited, is the measure? A differentiation between a Public Law Board—established by Congress—and a private board—such as the disputes committee established by the merger protective agreements—must be observed. The parties have freedom to vest jurisdiction in private boards as they see fit. All subject matter jurisdiction of a Public Law Board, however, is generated by the Railway Labor Act. It cannot sua sponte gather unto itself additional powers and authority, and no one but Congress can confer or vest in it subject matter jurisdiciton.

Additionally, a recognition of comity and the practical considerations of international relationships must be recognized. The amalgamation of the several railroads into BNI was the result of approval by the governments of both countries. The United States had no authority to authorize the consolidation of the operation of the Great Northern, Northern Pacific and Burlington lines in Canada. This required Canadian action. By Statutes of Canada, *14 Eliz. 11, Chapt. 23,* the authority to merge was granted, subject to all special legislation affecting the individual railroads, subject to the Railway Act of Canada, and subject to sanction by the Governor in Council upon recommendation of the Board of Transport Commissioners. The recommendation was made, and sanction ultimately given. There is nothing in the proceedings which sug-

gest that even though the merged company was specifically subjected to the Canadian Railway Act it was impliedly exempt from provisions of the Canada Labour Code. Obviously this is not the case, for this litigation results from an amendment to that law. The Canada Labour Code contains provisions for procedures to be followed in the event of a labor dispute. It is not unreasonable to expect that the Canadian authorities anticipated that this Code would apply in labor disputes involving the Canadian based employees of this United States corporation. To assume that we can ignore Canadian law, and superimpose the provisions of United States law on circumstances peculiarly Canadian in nature, places the labor legislation of the United States in direct conflict with the labor laws of Canada. This is a patent invasion and abrogation of Canadian sovereignty. The Canada Labour Code specifies certain provisions which every collective bargaining agreement must contain. Among these is a procedure for arbitration of labor disputes. Can it be that a Union and an employer can negate this law by agreeing that they will adopt non-conforming provisions of the law of the United States or of some other specified nation? In essence, this is what these plaintiffs now contend and this contention should be rejected.

The all encompassing concept which must ultimately be established in the resolution of this issue in this case is the breadth and scope of the extraterritorial reach which Congress first, could, and, then, intended, to impress upon the Public Law Board in the Railway Labor Act. This Court has found no authority which establishes that the Congress of the United States can pass legislation governing the substantive or procedural rights of the Canadian employees of a United States corporation. The Interstate Commerce Act and the Railway Labor Act clearly express an intent not to do so even if the power

exists. The intent of Congress should not be thwarted, and the jurisdiction of a Public Law Board enlarged, by agreement or by custom and practice.

The third question posed by the Court of Appeals should also be answered in the negative.

IV

Plaintiff has also moved the Court for an order voiding the award of the BLE-BNI merger disputes committee. This motion should be granted. At least in respect to the issues raised by this motion, the Court of Appeals has equated merger-related disputes with those arising from collective bargaining agreements. The Court clearly stated the law controlling in this Circuit when it said:

> "The only question is whether the UTU-E can sit on the arbitration board that is convened to decide a claim submitted by a UTU-E member to the UTU-E and by the Union to the BNI. We hold that they have a right to do so."

The use of the third person plural pronoun in the nominative case, rather than the third person singular pronoun in neuter gender, should cause no difficulty. The reasonable interpretation, in the context in which it is used, is that the right is that of the Union. Consequently, the union which is chosen by an employee as his representative in a merger-related dispute has an absolute right to a seat on the arbitration board, and the plaintiff is a proper party to seek this relief. The BLE-BNI disputes committee did not fulfill this requirement. This violated this right of the plaintiff, which is a derivative right which arises by virtue of its representative capacity for the employee in whom is vested the primary right. The disputes committee action, therefore, lacked due process and award No. 1A-E should be declared a nullity.

V

Some consideration should be given to the position which the employees will now occupy, lest assiduous protection of their collective rights which are embodied in the Union results in destruction or deprivation of individual rights. This consideration poses several questions which are not easily resolved. Undoubtedly the Railway Labor Act, *Sec. 3, First(j)*, preserves an employee's right to have a representative of his choice act on his behalf in a minor dispute arising from a collective bargaining agreement which is presented to the National Railroad Adjustment Board. This right cannot be nullified by an agreement between a carrier and a union. *Elgin, Joliet & Eastern Railway Co. v. Burley (1945) 325 U.S. 711.* However, it is also clear that Congress intended to vest in the Interstate Commerce Commission the jurisdiction to prescribe methods for solving labor-related problems arising directly from approved railroad mergers. *Title 49 U.S.C. §5(11); Brotherhood of Locomotive Engineers v. Chicago & North Western Ry. Co. (8th C.A. 1963) 314 F.2d 424.* The merger creating BNI, and the merger protective agreements, were approved by the Commission. In the absence of language manifesting a contrary intent, which does not readily appear, this approval includes an exemption from restraints of all other federal statutes, to the extent necessary to consummate the merger. The approval adopted the provisions for solving merger-related labor disputes which are contained in the merger protective agreements entered into by the BNI and the various labor unions. Where inconsistent with the Railway Labor Act, these provisions supplant that Act and become, as a matter of law, part of the conditions which the ICC is required to impose under Title 49 U.S.C. §5(2)(f). *See, Title 49 U.S.C. §5 (11).* Pursuant to the Order of the ICC, an implementation

agreement was entered into between BNI and the BLE which was specifically designed to afford machinery for arbitration of disputes involving persons engaged in the craft of locomotive engineers. The arbitration procedure set forth in that agreement should bind both the carrier and all of its employees who are subject to that agreement. This would include the employees affected by this litigation in any dispute which arises out of their status as locomotive engineers. The crucial issue is not whether or not arbitration is the proper method of settling this dispute, but is solely the procedure to be adopted in establishing the arbitration board. The Railway Labor Act does not promulgate an all encompassing policy which can serve to deny employees, union, or the carrier the right to bargain and enter into an enforceable agreement to arbitrate disdputes. In fact, the philosophy of the Act recognizes the national interest in enforced arbitration and mediation. This being true, it is difficult to perceive that there is a prohibition against a free and arm's-length merger protection agreement which effectively establishes the forum within which the arbitration proceedings involving merger related disputes are to be conducted. The intent of Congress, and of the ICC, seems to be that this vehicle is to be constituted in conformance with an agreement between the union certified to represent the particular employees and the carrier. The BLE is the designated, qualified, and exclusive bargaining agent for the locomotive engineering craft on the BNI lines. The BNI, therefore, is prohibited from dealing with any other Union in this regard. *See, 45 U.S.C. §152, Ninth; Virginian Railway Co. v. System Federal No. 40, supra.; Railway Conductors v. Switchmen's Union (5th C.A. 1959) 269 F.2d 726, cert. den. (1959) 361 U.S. 899.* To adopt any other approach would circumvent the basic principal of collective bargaining and permit an indi-

vidual employee to exclude himself at will from the bargaining unit. For collective bargaining and contract purposes, locomotive engineers on the BNI are exclusively represented by the BLE, and their rights, in that regard, are exclusively established by contract between the BLE and BNI. Granted that the employees are entitled to an unprejudiced tribunal which will afford a fair and impartial hearing, and then render a decision in conformance with the recognized requirements of due process; by extending the employee's right to select a representative to participate in the arbitration process from one whose role is participation as an advocate to one who participates as an essential part of the decision making body seems to raise an irreconcilable conflict between the individual's right of choice of representative, the Union's right to craft-wide representation, and the prohibition against the carrier treating with anyone but the certified collective bargaining agent. The interpretation of the merger agreements—which may be sui generis, but akin to collective bargaining agreements—should be the function of the arbitrator selected by the terms of the contract who can bring his informed judgment to bear on the full implication of such interpretation. It seems inconsistent to encourage the peaceful arbitration of disputes by negotiated agreements, but to superimpose a court's judgment on the miniature society which has, in effect, developed its own government. *See, Steelworkers v. Enterprise Corp. (1960) 363 U.S. 597; Steelworkers v. Warrior & Gulf Co. (1960) 363 U.S. 575.* It also seems to place in conflict the rights reserved to employees in respect to collective bargaining agreements under the Railway Labor Act with the superior right of the ICC to dictate by approval the terms and conditions of merger-related agreements which is contained in the Interstate Commerce Act.

These problems, however, while they appear to exist, must be relegated to the academic realm. This Court must remain cognizant of the fact that the opinion of the Court of Appeals was written by a jurist who is unusually well-qualifed by experience and expertise to speak on labor relations. The full import of the Court's position, and the nuances of the Court's reasoning, therefore, may escape the grasp of the less initiated.

It would appear, however, that:

1. A Public Law Board does not have subject matter jurisdiction in this dispute.

2. A disputes committee formed under the UTE-E—BNI agreements is not the proper forum to consider this matter. However, the pointed recognition by the Court of Appeals that a strong contra-argument can be made, is a little troublesome. The Court of Appeals sustained the determination of the trial court, which upheld the conclusion of SBA No. 793 that it had no jurisdiction to hear this dispute, apparently on the ground that plaintiff had consented to submission of the jurisdiction issue to that board and that the Court did not have jurisdiction to review that determination. The Court, however, questions its correctness. The Court states that this is a significant departure from the practice of permitting employees to process grievances through a union of their choice and to insist that the union have a representative on the board of arbitration. It finds no evidence to indicate that the UTU-E intended to waive this right, and, as evidence of the Union's intent to preserve this right, quotes from the merger protective agreement which obligates BNI to assume all contracts, agreements, and schedules existing between the merging railroads and the UTU-E concerning rates of pay, rules, working conditions, and fringe benefits. Perhaps the Court is implying that, by

custom and practice, jurisdiction lies in the forum chosen by the employee representative, and that the certified collective bargaining agent's participation in the arbitration proceedings can be limited to providing that forum with interpretations of the relevant agreements. Previously, the Court had stated that the merger protective agreements provided only one method by which issues arising from the merger could be determined and that this method was not exclusive. *United Transportation U.E. v. Burlington Northern, Inc. (8th C.A. 1972) 470 F.2d 813.* In that case, however, it does not appear that the Court was called upon to consider the provisions of the Interstate Commerce Act or the imprimatur placed upon the merger agreements by the Interstate Commerce Commission. Be that as it may, if the Court is indicating that it would sustain a UTU-E disputes committee's assumption of a controversy arising from one of its member's status as a locomotive engineer, then the problem may not arise in the future.

3. The BNI-BLE merger disputes committee is without power to decide this type dispute. The BLE-BNI merger agreements do not provide for a UTU-E member to participate as a member of the arbitration board. Again, however, because of the absolute right of the employee to insist upon such participation, and on the basis of custom and practice, it may be that such provision can be impliedly engrafted on these agreements, or it may be that the parties involved will see fit to formally amend them. This, of course, would also solve the problem.

4. The Canada Labour Code provides a procedure for determining this type of controversy. One is almost reluctantly forced to conclude that personal and subject matter jurisdiction, national interest, and the present lack of another recourse, act to nominate and elect the Canadian arbitration

procedure as the vehicle to select the proper judicial body to hear the present dispute. It is conceivable that the BLE-BNI-disputes committee procedure complies with the jurisdictional requirements of that law, and that its determination would be held to be final and binding by a Canadian tribunal. That determination should not be made by this Court.

WHEREFORE, it is—

RECOMMENDED: That the Court enter Findings:

1. That all of the labor forming the nexus of this dispute was performed outside the territorial limits of the United States and in the Dominion of Canada.

2. That there is not a longstanding custom and practice in the industry to submit disputes arising from labor wholly performed in Canada to a Public Law Board.

AND, That the Court enter a Conclusion of Law:

1. That custom and practice cannot confer extraterritorial jurisdiction upon a Public Law Board enabling that Board to entertain a labor dispute arising from labor wholly performed in Canada.

FURTHER,

That the Court enter an Order granting plaintiff's motion, in part, and adjudging Award No. 1A-E in case No. 1A-E of the Merger Disputes Committee created under the BLE-BNI Merger Protective Agreement null and void.

PATRICK J. McNULTY
United States Magistrate

All objections must be filed with the Clerk of Court, Minneapolis, Minnesota, within 10 days of the filing of the Memorandum Decision and Recommendation.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-75-444

GENERAL COMMITTEE OF ADJUSTMENT,
UNITED TRANSPORTATION UNION E.,
BURLINGTON NORTHERN INC.,
GREAT NORTHERN SEGMENT,

Plaintiff,

vs.

UNITED STATES OF AMERICA and
BURLINGTON NORTHERN INC.,

Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Defendant-Intervenor.

ORDER

Patrick J. Foley, 1101 North 27th Street, Billings, MT 59101.
John Sands, 818 Degree of Honor Bldg., St. Paul, MN 55101.
Robert V. Atmore, 4200 IDS Center, Minneapolis, MN 55402.
Harold A. Ross, 1548 Northern Ohio Bank Building, Cleveland, Ohio 44113.
Barry McGrath, Burlington Northern Inc., 176 East Fifth Street, St. Paul, MN 55101.

Before the Court are numerous motions. The plaintiff, United Transportation Union E (UTU-E) has moved for summary judgment. The defendant Burlington Northern (BN)

has filed a cross motion for summary judgment.[1] The defendant-intervenor, Brotherhood of Locomotive Engineers (BLE), has moved to dismiss the plaintiff's complaint pursuant to Rule 12, F.R.Civ.P.

The plaintiff UTU-E is the bargaining representative of the craft of firemen employed by the BN and the defendant-intervenor BLE is the bargaining representative of the craft of locomotive engineers also employed by the BN. The BN was created on March 2, 1970 as a result of a merger between the Great Northern, Northern Pacific, Chicago, Burlington and Quincy and the Spokane, Portland and Seattle railroads. The merger forming the BN was approved by the Interstate Commerce Commission (ICC) on November 30, 1967, 331 I.C.C. 228, pursuant to 49 U.S.C. §1 *et seq.* As part of the merger, BN entered into separate "Merger Protective Agreements" with both the UTU-E and the BLE which contained certain standard protective conditions for the affected employees. In addition, the agreements provided for the establishment of Dispute Committees to arbitrate the enforcement and application of the protective conditions.

The individuals on whose behalf the plaintiff UTU-E instituted this litigation are engineers employed by the BN in Vancouver, Canada. Even though these individuals are engineers and are members of the BLE, they are also members of the UTU-E. It is a common practice in the industry for individuals to belong to both unions since many engineers are ex-firemen.

The undisputed facts are as follows. As a result of a settlement under the Canadian Labour Code, the work week for engineers employed by the BN in Canada was reduced from

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[1] BN initially filed a motion to dismiss. However, it attached affidavits to its motion. Therefore, the Court will treat its motion as one for summary judgment. Rule 12(b) F.R.Civ.P.

six days to five days, thereby affecting the wage guarantees provided to engineers under the BN-BLE Merger Protective Agreement. The Canadian engineers who were affected by the work shrinkage disputed the application of the transition factor used to calculate the wage guarantees authorized under the protective agreement. The engineers disputing this transition factor were members of both the UTU-E and the BLE. They therefore requested the UTU-E, rather than the BLE, to submit their claim to the Disputes Committee established under the BN-UTU-E Merger Protective Agreement. The UTU-E's own disputes Committee, Special Board of Adjustment No. 793, held that it had no jurisdiction to consider claims arising out of the Merger Protective Agreement of the Engineers Union even though the engineers involved were also members of the UTU-E. The board further held that claims of locomotive engineers, regardless of union membership, had to be heard and decided by the Disputes Committee established under the Merger Protective Agreement adopted by the BN and BLE. The Disputes Committee created by the Merger Protective Agreement between the BN and BLE contains one member from the BLE, one member from the BN, and one neutral member—there is no representation of the UTU-E. Therefore, rather than processing the claims of these engineers through the Disputes Committee of the BLE, the UTU-E requested the BN to establish a Public Law Board pursuant to the Railway Labor Act, 45 U.S.C. §151 *et seq.*, to hear and decide these claims. The BN rejected the request and on August 25, 1975 served notice that it was submitting the claims of these Canadian engineers to the BN-BLE Disputes Committee.

Following the BN's action, the UTU-E filed this lawsuit requesting the Court to enjoin the enforcement of the decision

of its own Disputes Committee, Award No. 12 of Special Board No. 793. In addition, the UTU-E sought to enjoin the BN-BLE Disputes Committee from hearing and deciding these claims. The plaintiff's motion for a preliminary injunction was heard before this Court on October 6 and 7, 1975. A decision on the merits of the motion was suspended pending the submission of the case to the Interstate Commerce Commission (ICC). In an order dated February 19, 1976, Finance Docket 21478, the ICC held that it had no jurisdiction over the issues presented by the plaintiff's complaint. Subsequent to the ICC's decision, the plaintiff filed its motion for summary judgment which is now before the Court.

In its motion for summary judgment, the plaintiff UTU-E requests two forms of relief:

(1) a determination by the Court that BN has been and continues to discriminate against the UTU-E in respect to grievance representation, and;

(2) an order by the Court that the UTU-E is entitled as a matter of law to the establishment of a Public Law Board pursuant to the Railway Labor Act, 45 U.S.C. §151, *et seq.*, to hear and decide the claims presented by these Canadian engineers. The Court will consider each argument separately.

The UTU-E's contention that the BN has discriminated against it with respect to grievance representation is without merit. The UTU-E argues that because the BN has refused to submit these claims to a board upon which the UTU-E has representation, the BN has discriminated against it. The UTU-E relies upon *McElroy v. Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7th Cir. 1968) *cert. denied*, 393 U.S. 813 (1968) (*McElroy*) as authority for this proposition. However, that case merely holds that persons who are members of more than one union have the right to choose whichever union

they desire to represent them in grievance procedures. *McElroy*, 392 F.2d at 972. In the instant case, the BN has conceded from the start that the UTU-E has the right to represent these engineers before the BN-BLE Disputes Committee if it so desires. This is all that *McElroy* requires. It does not require that the BN submit this dispute to a board upon which the UTU-E has representation. *See, Louisville and N.R. Co. v. Cantrell*, 215 F.Supp. 229 (M.D.Tenn. 1962); *Clemens v. Central R.R. Co. of New Jersey*, 264 F.Supp. 551 (E.D.Pa. 1967), *rev'd on other grounds*, 399 F.2d 825 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

The real issue presented by this litigation is not whether the BN has discriminated against the UTU-E with respect to grievance representation but rather which board under either the merger agreements or by statute has jurisdiction to consider the claims raised by these Canadian engineers. The plaintiff UTU-E argues that the proper board is a Public Law Board established pursuant to the Railway Labor Act, 45 U.S.C. §151 *et seq.* The defendant BN and the defendant-intervenor BLE argue that the proper board is the BN-BLE Disputes Committee. In reaching a determination of this question, the Court must be mindful that the UTU-E's own Disputes Committee, a duly authorized arbitrator under the BN-UTU-E Merger Protective Agreement, held that the BN-BLE Disputes Committee was the proper forum to determine these issues.

The question as to whether a Public Law Board is the proper forum to determine these issues has been addressed by the Court of Appeals for the Eighth Circuit. In *Brotherhood of Locomotive Engineers v. North Western Railway Co.*, 314 F.2d 424 (8th Cir. 1963), the Court held the arbitration procedure adopted by the parties pursuant to a merger agreement ap-

proved by the ICC took precedence over the arbitration provisions contained in the Railway Labor Act. *Id.*, 314 F.2d at 433. On the basis of this decision it is clear that the plaintiff's request for the establishment of a Public Law Board pursuant to the Railway Labor Act, 45 U.S.C. §151 *et seq.* is without merit. For purposes of this litigation, the proper forum to determine the claims of these engineers is either the BN-UTU-E Disputes Committee or the BN-BLE Disputes Committee—the authorized arbitration tribunals under the respective merger protective agreements. The BN-UTU-E's Disputes Committee, Special Board No. 793, has already concluded that the proper forum for the resolution of these claims is the BN-BLE Disputes Committee. Given the limited powers of a court to review an arbitration decision, it is clear that the decision of the BN-UTU-E Disputes Committee is dispositive of this litigation.

The Court's role in reviewing an arbitration decision is limited solely to determining whether the decision "draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960); *International Union, etc. v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974); *General Drivers, Helpers and Truck Terminal Employees, Local 120 v. Sears, Roebuck & Co.*, No. 75-1647 (8th Cir. June 3, 1976). Viewing the decision of Special Board No. 793 in light of this standard, it is clear that its decision must be upheld. The essence of the BN-UTU-E Merger Protective Agreement is that it applies solely to firemen and enginemen, not to engineers. Therefore, Special Board No. 793 correctly determined that it had no jurisdiction to consider engineers' claims arising out of wage guarantees contained in the BN-BLE Merger Protective Agreement and that the resolution of such claims resided ex-

clusively in the province of the BN-BLE Disputes Committee. Furthermore, the plaintiff has nade no showing that this conclusion of Special Board No. 793 does not "draw its essence" from the Merger Protective Agreement.

On the basis of the foregoing authority, IT IS ORDERED THAT:

1) The plaintiff's motion for summary judgment is denied;

2) The defendant Burlington Northern's motion for summary judgment is granted;

3) The motion of the defendant-intervenor Brotherhood of Locomotive Engineers to dismiss is granted.

IT IS SO ORDERED.

Dated July 19, 1976.

MILES W. LORD
United States District Judge